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SOMETHING OF INTEREST IN REGARD TO CONTRACTS BROKEN BEFORE TIME FOR FULL PERFORMANCE HAS ARRIVED.

The case of Carmeau v. North American Transportation & Trading Company, 88 Pac. Rep. 834, decided by the Supreme Court of Washington, presents a proposition which has given the courts a great deal of trouble, and according to our view, was decided the wrong way. We realize however that there is much good consideration for the view taken in the principal case. The matter is well stated in the language of the court: "If a servant employed for a stated term is wrongfully discharged from his master's employment before the expiration of his term of service, may he thereafter maintain successive actions to recover subsequently accruing wages, or has he but a single right of action for damages for breach of his contract of employment? In other words, is a recovery in one action a bar to any further recovery for a breach of the same contract? The right to maintain successive actions for wages accruing after a wrongful discharge is based on the doctrine of constructive service, first announced by Lord Ellenborough in Gandell v. Pontigny, 4 Camp. 375. The decisions in Alabama, Georgia, Mississippi, Wisconsin, Minnesota, and possibly one or two other states follow this rule. On the other hand, the doctrine of Gandell v. Pontigny is no longer the law in England where it had its origin (Archard v. Hornor, 3 Car. & Payne, 349; Smith v. Hayward, 7 Ad. & Ell. 544." A large number of cases are given to support this view. The court then goes on to say: "In discussing the doctrine of constructive service in Howard v. Daly, *supra*, the court said: 'This doctrine is, however, so opposed to principle, so clearly hostile to the great mass of authorities, and so wholly irreconcilable to that great and beneficent rule of law, that a person discharged from service must not remain idle, but must accept employment elsewhere if offered, that we cannot accept it. If a person discharged from service may recover wages, or treat the contract as still subsisting, then he must remain idle in order to be always ready to perform the service. How absurd it would be that one rule of law should call upon him to accept other employment, while another rule required him to remain idle in order that he may recover full wages. The doctrine of "constructive service" is not only at war with principle, but with the rules of political economy, as it encourages idleness and gives compensation to men who fold their arms and decline service, equal to those who perform with willing hands their stipulated amount of labor.'"

We differ with the court for several reasons not specified in its opinion. The last paragraph above from that opinion does not truly state the situation, for the theory upon which the opposite view obtains is, that the servant is always ready and willing to perform his part of the contract, and he can not recover except upon that allegation If he is idle, it is not his fault, and so long as he stands ready and willing to perform his part, if he is allowed to remain idle, it is the fault of his employer, for he it is who has broken the contract. The law is not only made for the purpose of commanding what is right but also prohibiting what is wrong, therefore, so long as the servant stands ready and willing to perform his contract, is he to be precluded from further recovery by bringing a suit to recover what is already fairly due him? Surely there is no intention evinced by that act, not to be further bound by the terms of the contract, the very ground upon which the question is vested by all authority, as to whether a party has a right to regard a contract as wholly abandoned. This test was announced in the case of Freeth v. Burr, L. R. 9 C. P. 208. It was there stated: "Where the question is whether one party to a contract is set free by the acts of the other, the real matter for consideration is whether the acts and conduct of the one do or do not amount to an intention to abandon and altogether refuse performance of the contract." This opinion was afterwards sustained in the House of Lords, in the case of Mersey Steel & Iron Co. v. Naylor, 9 App. Cases, 438, and still later in the case of Johnstone v. Milling, 16 L. R. Q. B. D. 467, where it was said that "when one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention

then and there to rescind the contract. Such renunciation does not, of course, amount to a rescission of the contract, because one party cannot by himself rescind it, but by wrongfully making such renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him to bring an action in respect to such wrongful rescission." It would be a poor rule that did not work out as fully to the benefit of one as to the other, and to say that a party was bound to regard himself as having put an end to a contract by bringing suit to recover that which was his by virtue of an agreement solemnly entered into, would be, in many instances, permitting a party to obtain an advantage of his own wrong and thus abrogating, in such instances, a fundamental principle of the most sacred character. Suppose in the instance of a contract for several years' employment the employer should, as he necessarily does in such cases, willfully and without right, discharge the employee, is not that placing a stigma upon the employee that might prevent his getting other employment in the capacity in which he had been employed? And this, too, might occur from some mere whim on the part of the employer. The policy of the law which promotes the sacredness of the obligation of contracts, seems to us a far better rule than that which is laid down in the principal case. It seems to us the rule which would permit the resumption of the relationship, even though one of the parties had been obliged to bring a suit to recover that which was already due, is far better calculated to do justice and prevent injustice, than that laid down in the principal case, and is the only consistent position in view of the reasoning of the late English decisions, which have been fully accepted by the United States Supreme Court in Norrington v. Wright, 115 U. S. 210, and every other case decided by that court upon the same subject since. The rule seems absurd and unjust which would require a man to terminate the remainder of an obligation by bringing an action for that which had accrued to him by virtue of the obligation, and is not only against sound sense and good morals, in our opinion, but is plainly against the philosophy of recent decisions. Another reason also obtains against the position of the court in the principal case. Wherever a party willfully repudiates his contract the doctrine *omnia præsumunter contra spoiliatorem* (everything is presumed against the wrongdoer) obtains. This rule is recognized fully in Iowa, in the very able opinion in the case of Richmond & Jackson v. The D. S. C. R. Co., 40 Iowa, 264. It would be an unjust rule which would prevent the injured party from determining how he should proceed with regard to the contract, or prevent his having every possible advantage of a court's construction which might be made fairly in his favor.

NOTES OF IMPORTANT DECISIONS.

CONSTITUTIONAL LAW—EQUALITY OF TERRITORY AND POPULATION IN DIVIDING A STATE INTO REPRESENTATIVE DISTRICTS.—The Kentucky Court of Appeals has struck the gerrymandering politician a hard blow in the recent case of Ragland v. Anderson, 100 S. W. Rep. 865, where it holds that the act of the legislature of Kentucky passed March 23, 1906, re-dividing the state into representative districts and placing Ohio, Butler and Edmonson counties, with a population of 53,263 and a combined area of 1,241 square miles, into one district with only one representative, while Spencer county with only 7,407 population and 204 square miles, is made a district by itself, entitled to one representative, constituted such an unequal division as to violate Const. § 33, requiring a division of the state into districts as nearly equal in population as may be without dividing any county except where a county may include more than one district.

The court of appeals in the course of a very interesting and valuable opinion, said: "It is not insisted that the equality of representation is to be made mathematically exact. This is manifestly impossible. All that the constitution requires is that equality in the representation of the state which an ordinary knowledge of its population and a sense of common justice would suggest. We have not been referred to a more accurate or better description of the equality required by the constitution than that contained in the report of Daniel Webster, as chairman of a senatorial committee engaged in a duty similar to that involved in the act under discussion: 'The constitution, therefore, must be understood, not as enjoining an absolute relative equality, because that would be demanding an impossibility, but as requiring congress to make an apportionment of representatives among the several states, according to their respective numbers, as nearly as may be. That which cannot be done perfectly must be done in a manner as near perfection as can be. If exactness cannot, from the nature of things, be

attained, then the nearest practicable approach to exactness ought to be made. Congress is not absolved from all rule, merely because the rule of perfect justice cannot be applied. In such a case approximation becomes a rule. It takes the place of the other rule, which would be preferable, but which is found inapplicable, and becomes itself an obligation of binding force. The nearest approximation to exact truth or exact right, when that exact truth or exact right cannot be reached, prevails in other cases, not as a matter of discretion, but as an intelligible and definite rule, dictated by justice, and conforming to the common sense of mankind—a rule of no less binding force in cases to which it is applicable, and no more to be departed from than any other rule.' The definition of equality of representation as above contained, and the principle that any act of the legislature, which violates a constitutional requirement for that equality of representation, is void, is sustained by the following authority. State v. Cunningham, 83 Wis. 90, 53 N. W. Rep. 35, 17 L. R. A. 145, 35 Am. St. Rep. 27; Williams v. Secretary of State (Mich.), 108 N. W. Rep. 749; Denney v. State, 144 Ind. 503, 42 N. E. Rep. 929, 31 L. R. A. 126; Harmison v. Ballot Commissioners, 45 W. Va. 179, 31 S. E. Rep. 394, 42 L. R. A. 591; State v. Wrightson, 56 N. J. Law, 126, 58 Atl. Rep. 56, 22 L. R. A. 548; Giddings v. Secretary of State, 93 Mich. 1, 52 N. W. Rep. 944, 16 L. R. A. 402; Parker v. State, 133 Ind. 178, 32 N. E. Rep. 836, 33 N. E. Rep. 119, 18 L. R. A. 567; Commissioners v. Blacker, 92 Mich. 638, 52 N. W. Rep. 951, 16 L. R. A. 432; State v. Cunningham, 81 Wis. 440, 51 N. W. Rep. 724, 15 L. R. A. 561; People v. Thompson, 155 Ill. 451, 40 N. E. Rep. 307; People v. Rice, 135 N. Y. 473, 31 N. E. Rep. 921, 16 L. R. A. 836; Baird v. Supervisors, 138 N. Y. 95, 33 N. E. Rep. 827, 20 L. R. A. 81. He has studied our constitution in vain who has not discovered that the keystone of that great intrument is equality — equality of men, equality of representation, equality of burden, and equality of benefits. Section 1 of the Bill of Rights provides: 'All men are by nature free and equal. * * *' Section 3: 'All men, when they form a social compact are equal. * * *' Section 33 provides for equality of representation. Sections 171, 172, 173, and 174 provide for equality of taxation (uniformity). Section 39 provides for equality (general) of laws. Indeed, it could not be otherwise, for when our forefathers emigrated from their European home it was in the main to escape from the oppression of inequality. They brought with them a burning love for this great democratic principle, and imbedded it deep in the foundation of the empire they were destined to erect, and which they will preserve so long as the love of liberty is more than a name. When they threw off the supervising government of the mother country, it was because they were denied equality of representation; or, as they then expressed the evil, they had imposed upon them taxation without representation. Equality of representation is a vital principle of democracy. In proportion as this is denied or withheld, the government becomes oligarchical or monarchical. Without equality republican institutions are impossible. Inequality of representation is a tyranny to which no people worthy of freedom will tamely submit. To say that a man in Spencer county shall have seven times as much influence in the government of the state as a man in Ohio, Butler, or Edmonson, is to say that six men out of every seven in those counties are not represented in the government at all. They are required to submit to taxation without representation. It was this kind of oppression which inspired that great struggle for freedom which began on Lexington Green in 1775, and ended at Yorktown in 1781. Equality of representation is the basis of patriotism. No citizen will, or ought to, love the state which oppresses him; and that citizen is arbitrarily oppressed who is denied equality of representation with every other citizen of the commonwealth. It is no answer to the demand of appellees that the act of 1906 be declared unconstitutional to say that it will follow that the act of 1893 must also be declared unconstitutional, because it created unequal representative districts, although in a less degree than that of 1906. The conclusion sought to be drawn does not follow. The act of 1893 has gone into effect, and the government has been organized under it. To hold it void would be to throw the government into chaos; and this no court is required to do. It is now too late to question its validity. The next legislature must be elected under it, and then we have no doubt the members, impelled by their sense of duty, the obligations of their oath of office, together with that spirit of justice which is the heritage of the race, will redistrict the state as the constitution requires."

LATENT EQUITIES.

It is a fundamental and well established principle of equity jurisprudence that where there are equal equities the first in order of time shall prevail, or "*Qui prior est tempore, potior est jure.*"[1] Another principle also firmly rooted in our equity jurisprudence is, that where there is equal equity, the law must prevail; or as Pomeroy points out: "If each of two persons is equally entitled to the protection and aid of a court of equity with respect of his equitable interest, and one of

[1] Rice v. Rice, 2 Drew. 73; Mackreth v. Symmons, 15 Ves. 354; Fitzimmons v. Ogden, 7 Cranch, 2; Corvan v. Bank, 45 Vt. 160; Booth v. Bunce, 33 N. Y. 139; Hume v. Dixon, 37 Ohio St. 66; Neslie v. Wells, 104 U. S. 428.

them, in addition to his equity also obtains the legal title in the subject matter, then he who thus has the legal estate will prevail."[2] Furthermore, the rule is firmly established by an uninterrupted line of authorities, that the assignee of a non-negotiable chose in action takes such chose subject to all the equities to which it was liable in the hands of the assignor;[3] or as Pomeroy indicates,[4] "subject to all the defenses, legal and equitable of the debtor who issued the obligation." Thus far we encounter but little difficulty, inasmuch as these principles of equity jurisprudence are uncontroverted. But concerning the subject of "latent" or secret equities we find no such unanimity among the courts.

The subject of latent equity is somewhat difficult of treatment, since it is susceptible of no very accurate definition and can only be explained and properly discussed by a review of the cases involving the subject. Furthermore, the subject covers a wide field and is very comprehensive, inasmuch as it is rather difficult to classify and designate just what equities may be described as "latent."

Pomeroy[5] describes or defines such equities as follows:

"The equities of a prior assignor, or of a third person have sometimes been called 'latent.'" This definition, though not very clear or even satisfactory, is perhaps, as accurate as the term will admit. "Latent equities" therefore, embrace those equities which are secret and undisclosed at the time of the assignment of the chose, residing either in some prior assignor, or in some third party, a stranger to the assignment. Such "latent equities" appear after the assignment of the chose and the pertinent question then arises, whether or not an assignee in good faith, for value and without notice, of a non-negotiable chose in action takes the chose subject to, or free from such "latent equities." Concerning the solution of this question, the American courts are not agreed and a direct and apparently hopeless conflict exists. Eminent authorities hold that the assignee is bound by such latent equities; other eminent authorities declare that the assignee must be protected from such equities. I shall not attempt a complete reconcilement of the conflicting decisions, since it would be a hopeless task. This paper will contain a general review of some of the principal holdings and authorities, because the subject can only be developed and made clear by such review. Then I shall suggest an explanation of the conflict of cases in some instances. But even then, there still remains many directly conflicting decisions, a reconcilement of which is impossible. A review of authorities, other than those cited in this paper, will be found in the appended digest.

The doctrine of "latent equities" was probably first given prominence in the United States in 1817 by Chancellor Kent. In Murray v. Lylburn,[6] Chancellor Kent passed upon the question whether the assignee of a bond and mortgage, was subject to secret equities and invisible liens, of which he had no notice. The learned Chancellor says: "The assignee can always go to the debtor and ascertain what claims he may have against the bond, or other chose in action, but he may not be able with the utmost diligence to ascertain the latent equity of some third person. He has not any object to which he can direct his inquiries." Chancellor Kent, in the course of his opinion, makes reference to a decision of Lord Eldon's.[7] In that case Lord Eldon decided that the assignee, not having had notice, took the chose free from any latent equities residing in a third party, a stranger to the assignment. Lord Eldon observed that if such equities could constantly be asserted, "no assignments could ever be taken with safety." This dictum, announced by Chancellor Kent in 1817, was probably the earliest opinion in this country concerning the subject of "latent equities." This dictum was followed in the New York courts,[8] but was subsequently repudiated in that state as will appear later in

[2] Equity Juris. I, sec. 417; Gerrard v. Sanders, 2 Ves. 454; Rowon v. Bank, 45 Vt. 160; Simmons v. Ogle, 105 U. S. 271; Soylor v. Morgan, 86 Ind. 295; Preston v. Turner, 36 Iowa, 671; Wright v. Randal, 8 Fed. Rep. 581.

[3] Ord v. White, 3 Beav. 357; Ingraham v. Disborough, 47 N. Y. 21; Kleeman v. Frisbie, 63 Ill. 482; Boardman v. Hayne, 29 Iowa, 339; McKenna v. Kirkwood, 50 Mich. 544; U. S. v. Ry. Co., 12 Wall. 362; Fairbanks v. Sargent, 104 N. Y. 116; Williams v. Donnelly, 54 Neb. 193.

[4] Eq. Juris. II, sec. 704.

[5] Eq. Juris. II, sec. 708.

[6] 2 Johns. Ch. 44.

[7] Redfearn v. Ferrier, 1 Dow. 50.

[8] Jones v. Morey, 2 Cowen, 246.

this paper. In Bush v. Lathrop,[9] Chancellor Kent's review was repudiated and the assignee was held bound by latent equities. Various jurisdictions in this country have followed either the dictum of Chancellor Kent, protecting the assignee from latent equities, or have followed Denio, J., in Bush v. Lathrop, subjecting the assignee to such equities. From that time to the present, a direct conflict of authorities has been the result. First, I will discuss the cases and give the views of some of the principal courts which have followed Chancellor Kent; then discuss the contrary view, and finally attempt a partial reconcilement, or at least suggest such.

The New Jersey Equity Court, generally recognized as an exceedingly able court, protects the assignee of a non-negotiable chose from "latent equities." In an early case in 1856,[10] the court held, in determining the rights of an assignee of a bond and mortgage, that "to subject the assignee to the latent equity of a third party, the assignee must have notice of such equity at the time of the assignment." The court advances what seems to me to be very cogent and convincing reasoning in support of the decision: "Such a secret equity does not affect the assignee, for the reason that it was not within the compass of any inquiry the assignee could make to discover any such equity. Such an equity was latent in a third person." In a later case[11] the New Jersey court holds likewise: "A latent or secret equity is without force against a *bona fide* assignee of a mortgage. No caution or diligence of the most careful purchaser will enable him to discover a secret equity and unless he has notice will not be bound by it. A contrary rule would render mortgages practically inalienable. The discovery of such latent equity if possible at all, is a pure matter of chance." The New Jersey court holds the same view in other cases.[12] In the later case of Putnam v. Clark, the court even goes so far, in support of its view, to assert that it "is an undoubted principle of equity jurisprudence that a *bona fide* assignee of a mortgage for value, acquires a title, free from all latent equities, existing in favor of third persons." This statement, I think, is too sweeping, since later cases will disclose that such a principle is by no means firmly established in our equity jurisprudence. The New Jersey cases are supported by very clear reasoning. The same reasoning is found in very nearly all of the later cases, following that view. Lord Eldon's observation[13] has also been given much weight "that if latent or secret equities could constantly be asserted, no assignment could ever be taken with safety."

The Nebraska court has adopted the view, protecting the assignee of the non-negotiable chose from latent equities. In the case of Williams v. Donnelly,[14] the question arose whether the assignee of a non-negotiable certificate was subject to latent equities. Harrison, C. J., by way of dictum followed Chancellor Kent[15] and protected the assignee from secret and latent equities of which he had no notice. In the case of First National Bank v. Edgar,[16] the question of latent equities arose and the court followed the view just announced. Not many cases involving the question have arisen in Nebraska, but I think Chancellor Kent's view would be adopted and the assignee protected. The Massachusetts courts also adopt this view. In Sleeper v. Chafman,[17] the court held that the "assignee for value and without notice of a mortgage, given in fraud of creditors, acquire a good title against the creditors of the original grantor." Other Massachusetts cases have held that the assignee is protected from secret and invisible equities [18] The California court follows New Jersey and Massachusetts. In Wright v. Levy,[19] the question arose whether or not the assignee of a judgment was subject to latent equities. The court protected the assignee, holding "that the assignee is bound to inquire into the defenses of the debtor, but could not be held to inquire into 'latent equities,' existing in the hands of third persons." A later case announces the same doctrine.[20] Iowa, in protecting the

[9] 22 N. Y. 535, post.
[10] Losey v. Simpson, 11 N. J. Eq. 246.
[11] Vredenburgh v. Burnet, 31 N. J. Eq. 229.
[12] Danbury v. Robinson, 14 N. J. Eq. 213; Starr v. Hoskins, 26 N. J. Eq. 414; Putnam v. Clark, 29 N. J. Eq. 412.
[13] *Supra.*
[14] 54 Neb. 193.
[15] *Supra.*
[16] 65 Neb. 340.
[17] 121 Mass. 404.
[18] Bigelow v. Smith, 2 Allen, 264; Green v. Tanner, 8 Met. 411; Hoffman v. Naple, 6 Met. 68.
[19] 12 Cal. 357.
[20] Bridgeport v. Bank, 107 Cal. 55.

assignee from latent equities advances very clear reasons, and in my opinion such reasoning is very sound, and is much better than that advanced by the courts, which hold that the assignee is bound by such equities. In Crosby v. Tanner,[21] the court held: "As to third persons, the assignee can make no inquiry for nothing points him to the proper party of whom he is to obtain information. Such an assignee would find safety only in inquiries extended to the whole world." Other Iowa cases have announced the same view.[22] An inspection of Illinois cases also shows that in that state, protection is given to the *bona fide* assignee of a non-negotiable chose, when latent equities appear. In discussing the assignment of a mortgage the court held in Sumner v. Waugh[23] "that the assignee is not subject to the latent equities of third persons, of whose rights he could know nothing." In Silvennon v. Bullock,[24] the court fortifies itself with clear reasoning, when it holds: "The assignee of a mortgage is not subject to latent equities. Persons can, without difficulty inquire of the makers if any defenses exist against them, but more than that it is not practicable to do. It would not be possible to discover, even by the utmost diligence, all persons that might have equitable rights in the subject matter of the assignment, and the adoption of a rule that would let in latent equities to prevail against the assignee, would be to ensnare dealers in such securities." Later Illinois cases follow these decisions.[25] Many other courts also protect the assignee, but it is unnecessary to cite them, inasmuch as the reasoning advanced is very similar to that advanced in the New Jersey and Illinois cases, and in Chancellor Kent's and Lord Eldon's opinions. The following jurisdictions also protect the assignee of a non-negotiable chose from secret and latent equities: Pennsylvania;[26] Virginia;[27] Wisconsin;[28] South Carolina;[29] Indiana;[30] Mississippi;[31] Maryland;[32] Missouri;[33] Ohio;[34] Kansas;[35] Texas;[36] North Carolina;[37] Washington.[38]

I have not quoted authorities other than the courts, since the limits of this paper will not admit. The conclusion of Black is interesting, however, in connection with this subject. Black says in his valuable work on Judgments:[39] "The assignee of a judgment is not affected by latent equities of third parties of which he had no notice at the time of the assignment."

Thus far we have noticed that the observations of Lord Eldon and Chancellor Kent upon the subject of "latent equities" have been incorporated into and made a part of many decisions in many jurisdictions; that many American courts, including some of the ablest, have protected the assignee of a non-negotiable chose, from latent equities residing in some prior assignor, or in some third party, of which equities the assignee had no notice. As to the consideration supporting the equitable assignment of the chose, its sufficiency and valuableness, we are not directly concerned. Furthermore, the questions of equal equities and the combination of a legal and equitable title will not be considered here, since the limits of this discussion will not admit. We are here concerned only with "latent equities;" should the assignee of a non-negotiable chose be protected from such equities, and if so, why? The scope of this paper makes it imperative that we assume that the assignee is a *bona fide* holder of the chose for value and without notice of antecedent equities. The cases so far cited proceed upon this assumption and under such circumstances hold, with clear reasoning that the assignee is entitled to protection.

We come now to a brief review of the courts which hold a contrary view—that such an assignee of a non-negotiable chose takes the chose, subject not only to the equities in the

[21] 40 Iowa, 136.

[22] Hale v. First Natl. Bank, 50 Iowa, 642; Gibson v. McIntyre, 110 Iowa, 417.

[23] 56 Ill. 531.

[24] 98 Ill. 11.

[25] Himrod v. Gilman, 147 Ill. 293; Humble v. Curtis, 160 Ill. 193.

[26] Prior v. Wood, 31 Pa. St. 142; McMostes v. Wilhum, 85 Pa. St. 218; Mifflin's Appeal, 98 Pa. St. 150.

[27] Moore v. Holcomb, 24 Am. Dec. 683.

[28] Craft v. Bunster, 9 Wis. 457.

[29] Robertson v. Segler, 24 S. Car. 387.

[30] Robertson v. Roberts, 20 Ind. 155; Shirk v. North, 138 Ind. 310.

[31] Duke v. Clark, 58 Miss. 455.

[32] Kemper v. McPhearson, 7 H. & J. 220.

[33] Garland v. Harrison, 17 Mo. 282.

[34] Swartz v. Leitz, 13 Ohio St. 419.

[35] Ives v. Addison, 39 Kan. 172.

[36] Heinman v. Keignon, 39 Tex. 34.

[37] Church v. Church, 64 Pac. Rep. 750.

[38] LeDuc v. Slocomb, 124 N. Car. 347.

[39] Black, Judgments, p. 1413.

hands of the assignor, but also subject to all latent and secret equities. Before reviewing the authorities, I might say that many courts refuse to protect the assignee for this reason —if such protection is given the distinction between negotiable and non-negotiable instruments is virtually destroyed and the qualities, characteristics and privileges now attaching to negotiable choses will then attach also to non-negotiable choses. Pomeroy[40] adopts this attitude when he says: "The theory that latent equities can not prevail against an assignee, is in effect, an extension of the peculiar qualities of negotiable instruments to things in action not negotiable. The contrary doctrine is correct as based upon principle, and must be so regarded, as long as the distinction between negotiable and non-negotiable obligations is preserved in our jurisprudence." It seems to me that Pomeroy's reasoning could be materially weakened by showing that the non-negotiable choses—mortgages, bonds and judgments—are today in most instances, evidence of debt and security, and are virtually, in many respects at least, on the same basis commercially as many negotiable choses, and that therefore the distinction Pomeroy suggests is not so material as it might be under other circumstances. If protection from latent equities is given to a purchaser of a negotiable chose, because such chose passes as an evidence of debt and security, why should not protection likewise be given to assignees and purchasers of certain non-negotiable choses, almost quasi-negotiable, which are on the same basis commercially and are used for the same purpose? But this question can not be developed here. As suggested above, the New York court has repudiated Chancellor Kent's view, and now holds that the assignee is to be given no protection from latent equities. In Bush v. Lathrop,[41] a bond and mortgage constituted the subject matter of the assignment. Denio, J., held, "that the mortgage in the hands of a *bona fide* purchaser was subject to all the equities existing between the original assignor and his assignee." In this case, the court makes reference to a holding of Lord Thurlow's in Davies v. Austin,[42] where Lord Thurlow holds "that a purchaser of a chose in action must always abide by the case of the person from whom he buys." Denio, J., also held, after reviewing several earlier New York cases more or less in point,[43] that "there is no distinction between latent equities and those existing between the original parties to a non-negotiable chose in action." I must confess that the holding seems to me rather arbitrary, since the court does not advance many reasons and repudiates Chancellor Kent's view, without attacking Kent's clear reasoning.[44] Bush v. Lathrop has been followed in New York, an exception being made in the case of estoppel, which exception I shall discuss later. In Schaefer v. Reilly,[45] the New York court also held "that the assignee of a mortgage takes the same, subject to latent equities." Better reasoning is found here than in Bush v. Lathrop. The court says: "An assignor can give no other or better title than he himself has, and the assignee must be content to stand in his place." In Cutts v. Guild,[46] the rights of an assigne of a judgment were in question. The court followed the other New York cases and made reference also to Lord Thurlow's holding.[47] The same doctrine is approved and followed in other New York cases.[48] A comparison of the New Jersey and Illinois cases which protect the assignee, with these New York cases, shows that the New Jersey and Illinois courts fortify their view with better and clearer reasoning. Vermont also holds that the assignee is bound by all secret and latent equities.

In Dowrer v. South Royalton Bank,[49] the question of the assertion of latent equities against a *bona fide* holder for value of a judgment arose. This case discloses better reasoning than is found in the New York cases. The court holds: "The assignee takes the judgment, subject to equities residing in a third person against the assignor. The assignee stands in exactly the same situation as the assignor, as to equities arising upon the chose. He must be taken to be cognizant

[40] Eq. Juris. II, sec. 708.
[41] 22 N. Y. 535.
[42] 1 Ves. 247.
[43] Jones v. Morey, 2 Cow. 246; Stafford v. Von Rensslaer, 9 Cow. 316; Corell v. Bank, 1 Paige, 131; Meir v. Schenck, 3 Hill, 228.
[44] *Supra.*
[45] 50 N. Y. 61.
[46] 57 N. Y. 229.
[47] *Supra.*
[48] Trustees Union College v. Wheeler, 61 N. Y. 88; Green v. Warwick, 64 N. Y. 220; Owen v. Evans, 134 N. Y. 514.
[49] 39 Vt. 25.

of them. It is his duty to make inquiries. If a loss arises, it must fall upon him whose duty it is to make the inquiries. The right acquired by the purchaser or assignee can not rise higher than that of the seller or assignor. The assignee can acquire no greater right than the assignor had." Other Vermont cases hold the same view.[50] Similar reasoning is found in other cases and jurisdictions, where the assignee is refused protection. But it seems to me that such reasoning entirely overlooks the observations of Chancellor Kent and Lord Eldon. How can the assignee, even with the utmost diligence, ascertain such latent equities? What object has the assignee, to which he can direct his attention? Must he extend his inquiries over the entire world in searching for latent equities? If so, what assignment could be taken with safety? In answer, the Vermont court holds, the assignee must make inquiries and must be held to be cognizant of hidden equities. In other words, the *bona fide* assignee for value is often bound to do what Chancellor Kent held to be a practical impossibility—attempt a discovery of all such hidden, latent equities.

Georgia follows New York and Vermont, in refusing protection to the assignee or purchaser. In Bank of Atlanta v. Western Ry. Co.,[51] the court held that the assignee of certain non-negotiable vouchers "is subject to all latent equities, even though no notice was had." Other Georgia cases hold the same view.[52] In Jack v. Dons[53] the court held: "The assignee of a non-negotiable chose takes only his assignor's rights." Michigan prefers the New York view and in Spinning v. Sullivan[54] holds, that "the assignee takes the chose subject to antecedent equities." In deciding the case, reference is made to the New York cases.[55] New Hampshire adopts the same view and advances similar reasoning. In the case of Clark v. Whitaker,[56] the court holds: "The assignee of the chose has no greater rights than his assignor. The superior right claimed by the holder of negotiable paper rests upon the custom of merchants."

The United States Supreme Court adopts the same view,[57] but gives no satisfactory reasoning and is content simply to make reference to the New York cases.[58] The other jurisdictions which refuse to protect the assignee from latent equities are: Louisiana;[59] Tennessee;[60] Arkansas.[61] Pomeroy also accepts this view, and says in his learned treatise on Equity Jurisprudence:[62] "A subsequent assignee is subject to all equities, subsisting in favor of the original, or other prior assignor." Pomeroy asserts that the weight of authority supports this view, but I am convinced, after an inspection of the cases, that the weight of authority, protects the assignee of a non-negotiable chose from latent equities.

This more or less cursory review shows the conflicting views which the courts hold upon this subject of latent equities. The courts protecting the assignee, follow the reasoning of Lord Eldon and Chancellor Kent,[63] while the courts which subject the assignee to latent equities follow Lord Thurlow[64] and the early New York case of Bush v. Lathrop.[65] As intimated above, the courts are also divided upon the questions, who is a *bona fide* holder for value? What is a valuable consideration? What constitutes notice?; but with these and other interesting questions, this paper is not directly concerned. Assuming that the assignee is a holder for value, and without notice, the cases cited in this paper hold squarely on the subject of latent equities, either protecting the assignee or subjecting him to such equities. The cases cited show how latent equities arise. Such equities are too numerous to permit classification or enumeration here. It is sufficient to note that after an assignment of a non-negotiable chose in action, these secret, hidden and invisible equities, known as "latent" arise, and the assignee must either be protected from them or be subjected to them. I

[50] Loomis v. Loomis, 26 Vt. 198; Barney v. Grover, 28 Vt. 391.
[51] 114 Ga. 890.
[52] Gueny v. Perryman, 6 Ga. 123; Jack v. Dons, 29 Ga. 219; Cahen v. Prater, 56 Ga. 203.
[53] 29 Ga. 219.
[54] 48 Mich. 5.
[55] *Supra.*
[56] 50 N. H. 474.
[57] Cowdery v. Vonderhugh, 101 U. S. 772.
[58] *Supra.*
[59] Adams v. Webster, 25 La. Ann. 117.
[60] Trafne v. Bankhead, 2 Tenn. Ch. 412.
[61] Pindall v. Trevor, 30 Ark. 249.
[62] Eq. Juris. II, sec. 708–709.
[63] *Supra.*
[64] *Supra.*
[65] *Supra.*

shall not attempt a complete reconcilement of these conflicttng authorities. Such a reconcilement would be impossible. But I desire to make reference to a few well settled and clearly established principles of equity jurisprudence, the application of which principles may operate to explain and partially remove the discrepancies and disagreements in some of the above cases. Investigation of some of the cases which subject the assignee to secret, latent equities, discloses that in some instances, such holdings are, as Pomeroy points out,[66] "a mere expression of the general principle, that among successive equitable interests in the same thing, the order of time prevails." Now it is generally conceded by the courts that such an equity, merely and solely the result of time, is an extremely feeble equity. If, therefore, the assignee of the non-negotiable chose has a superior equity, such will clearly entitle him to protection. An instance of such superiority, sufficient to insure protection, arises when the holder of the interest, prior in time only, is guilty of laches in asserting his equity, as is often the case. Under such circumstances, the prior equity becomes inferior to that of the assignee's and the assignee will not be subject to it. Another instance of superiority in the equity of the assignee, arises where the assignee gives notice. In such a case the notice is regarded as equivalent, or at least analogous, to the act of taking possession and the *bona fide* assignee for value, who thus first gives notice, obtains a precedence over holders of latent equities and others, even though they may be earlier in time.[67] Notice may thus destroy a precedence otherwise existing. Furthermore, it is apparent that if the assignee holds, in addition to his equity, the legal title, he will be protected from latent equities, because where there is equal equity the law prevails. Other instances of superiority might be mentioned, sufficient to protect the assignee from latent equities, but space will not permit.

The last principle that I will suggest, which confers superiority is that of estoppel. This doctrine of estoppel has often been invoked to cut off latent equities and protect the assignee. For instance, where the third party, the real owner of the chose, in whom the latent equities reside, has by assignment conferred an apparent, absolute ownership, or has clothed his assignee with the apparent *indicia* of title, then when such assignee transfers or assigns the chose, the owner is estopped from asserting whatever equity he may have in the chose against the second assignee, an innocent purchaser for value and without notice. Further elaboration upon this doctrine of estoppel is unnecessary here. The courts and authorities are agreed that such cuts off prior and latent equities and protects the assignee.[68] In some of the cases, therefore, which hold that the assignee is protected from all latent equities, the holdings might and no doubt could, be explained by an application of some of the principles just given, viz., laches, notice and especially estoppel. In this way I think a partial reconcilement of the authorities would be possible. But a careful inspection of the cases shows, that while the principles just announced might have been made the basis of many decisions, most of the cases do not suggest such badges of superiority in the equity of the assignee. But even if a partial reconcilement is possible, many decisions are yet in direct conflict and no satisfactory explanation of the discrepancies and disagreements can be given.

This discussion and review of authorities leads me to conclude, therefore, not as Pomeroy does,[69] that the weight of authority does not protect the assignee from latent equities, but that the weight of authority, supported by better and clearer reasoning, protects the *bona fide* assignee for value, from all secret and latent equities. Pomeroy[70] designates this view as the "narrower view," but inspection and analysis of the cases convinces me that such a view is really broad and liberal and is just in its operation and effect. I think that the courts have very properly given much weight to the reasoning of Chancellor Kent and Lord Eldon:[71] "How can the assignee, or purchaser, even with the utmost caution and diligence, ascertain such latent equities? If such equities can constantly

[66] Eq. Juris. II, sec. 707.
[67] Pomeroy Eq. Juris. sec. 695.
[68] Pomeroy Eq. Juris. II, secs. 710-711; Pomeroy's Rem. and Remedial Rights, sec. 161; McNeil v. Tenth Natl. Bank, 46 N. Y. 325; Dones v. Backstein, 69 N. Y. 440; Barston v. Sorage Co., 64 Cal. 388; Bank v. Bank, 71 Mo. 183; Combes v. Chandler, 33 Ohio St. 178.
[69] *Supra.*
[70] Eq. Juris. II, sec. 714.
[71] *Supra.*

be asserted, how can assignments be taken with safety?"

In discussing "latent equities" I have been concerned only with the assignment of non-negotiable choses in action, such choses as bonds, mortgages and judgments. As to negotiable choses, the cardinal rule is that the purchaser for value and without notice is protected from all latent equities.[72] The reasons for such rule are apparent and do not require discussion here. My conclusions concerning latent equities, such equities arising after the assignment of non-negotiable choses in action, are these: (1) The majority of American courts hold, that the *bona fide* assignee for value and without notice, of a non-negotiable chose in action, is protected from all secret and latent equities, that is, equities existing in some prior assignor or residing in some third person, a stranger to the assignment. The reasons for such holding are briefly these: The assignee can not with the utmost diligence ascertain such latent equities. It is not within the compass of any inquiry the assignee could make to discover such equities. If such equities could constantly be asserted no assignment could be taken with safety. (2) Other jurisdictions, including New York and the United States Supreme Court, adopt the view that the assignee of a non-negotiable chose is subject not only to the equities in favor of the debtor party, but subject also to all latent equities residing in prior assignors or in third parties. The reasons for such view stated briefly are these: The purchaser of the chose must abide by the case of the person from whom he takes.[73] An assignee can take no better rights than his assignor could give. The assignee is bound to inquire as to the existence of latent equities. Among successive equitable interests in the same thing, the order of time prevails. (3) A complete reconcilement of the conflicting decisions is impossible, but there are several principles of equity jurisprudence, which if applied, would remove some discrepancies and result in a partial reconcilement. First. Many of the decisions which hold that the assignee is bound by latent equities, often proceed upon the rule: "*qui prior est tempore, potior est jure*," although such is not really given as the *ratio decidendi*. Second. Many of the cases which protect the assignee from such latent equities give such protection, because the assignee's equity is really superior, such superiority resulting from estoppel, or laches, or notice given by the later assignee, although such are not advanced as the reasons for protecting the assignee.

An application of these principles just suggested, would in some cases, effect a reconcilement, but even then, there remains a direct conflict of authority upon the subject of "latent equities." A digest of the cases is appended.*

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Spokane, Wash.

[72] Bigelow, Bills, Notes and Cheques, pp. 232, 250.
[73] Lord Thurlow, *supra*.

*APPENDIX.

DIGEST OF CASES INVOLVING THE SUBJECT OF LATENT EQUITIES.

England.—Lord Eldon: "The assignee takes the chose free from any secret or latent equity in a third party, a stranger to the assignment. If such latent equities could constantly be asserted, no assignments could ever be taken with safety." Redfern v. Ferrier, 1 Dow. 50. Lord Thurlow: "A purchaser of a chose in action must always abide by the case of the person from whom he buys." Davies v. Austin, 1 Ves. 247.

United States Supreme Court.—This court seems to hold that no protection will be given the assignee from latent equities. "The purchasers of non-negotiable demands from others than the original owner, can take only such rights as he has parted with, except where by his act he is estopped from asserting his original claim. The purchaser of the non-negotiable chose must, as Lord Thurlow said, abide by the case of the person from whom he buys." Cowdery v. Vanderburgh, 101 U. S. 772.

Alabama.—Alabama also protects the assignee from latent equities. "Defenses and equities existing between a mortgagee and third persons will not affect the rights of the assignee of the mortgage, unless he had notice. He may not by utmost diligence acquire knowledge of latent equities in third persons." Dunlin v. Hunter, 98 Ala. 539; Tison v. Loan Association, 57 Ala. 323; Goldthwaite v. Bank, 67 Ala. 589.

Arkansas.—The assignee of a non-negotiable chose is subject to latent equities. "The assignee is affected with all the equities attaching to the chose. The assignee cannot be placed by the assignment in a better position than the assignor was." Puidall v. Trevor, 30 Ark. 270.

California.—California courts protect the assignee from latent equities. Is the assignee of a judgment affected by secret and latent equities? "The assignee is not bound; he cannot be held to inquire into latent equities existing in the hands of third persons." Wright v. Levy, 12 Cal. 257; Bridgeport v. Bank, 107 Cal. 55.

Colorado.—No decisions in Colorado involving the subject.

Connecticut.—No decisions found.

Delaware.—No decisions found.

Florida.—No decisions found.

Georgia.—Latent equities may be asserted against the assignee. In discussing the assignment of non-negotiable vouchers, the court holds: "The assignee is always liable to be defeated by latent equities." Bank of Atlanta v. Railway Co., 114 Ga. 890; Guerryiv. Perrymon, 6 Ga. 123; Jack v. Davis, 29 Ga. 219; Cahen v. Prater, 56 Ga. 203.

Illinois.—Illinois protects the assignee from latent equities, and in every case gives clear-cut and cogent reasoning. "The assignee of a mortgage is not subject to the latent equities of third persons, of whose rights he could know nothing." Sumner v. Waugh, 56 Ill. 531. "It would not be possible to discover, even by the utmost diligence, all equitable rights, and the assignee is not subject to latent equities." Silverman v. Bullock, 98 Ill. 11; Himrod v. Gilman, 147 Ill. 293.

Indiana.—Indiana follows New Jersey and Illinois, protecting the assignee. "The assignee of a judgment is not subject to equities in favor of third persons, of which he had no notice. The assignee has no means of ascertaining the claims of such third persons." Roheson v. Roberts, 20 Ind. 161; Shirk v. North, 138 Ind. 310.

Iowa.—In Iowa the assignee is not bound by secret equities. "As to third persons, the assignee can make no inquiry, for nothing points him to the proper party. Such an assignee would find safety only in inquiries extended to the whole world." Crosby v. Tanner, 40 Iowa, 136; Hale v. Bank, 50 Iowa, 642; Gibson v. McIntyre, 110 Iowa, 417.

Kansas.—Kansas protects the assignee from latent equities. "The assignee in good faith for value and without notice is not affected by secret and latent equities." Ives v. Addison, 39 Kan. 172.

Kentucky.—No decisions found.

Louisiana.—No late cases have been decided in Louisiana. In an early case (Adams v. Webster, 25 La. Ann. 117) the court held that the assignor could assign only such rights as he had and the assignee would be bound by latent equities.

Maine.—No decisions found.

Maryland.—Maryland protects the assignee from latent equities. "The equities of a non-negotiable chose, a mortgage, subject to which it passes to the assignee, are the equities of the debtor himself, and not equities residing in some third person against the assignor." Life Ins. Co. v. Wiron, 2 Md. Ch. 25.

Massachusetts.—The assignee is not subject to latent equities. "The assignee for value and without notice of a mortgage acquires a good title against the creditors of the original grantor." Sleeper v. Chapmon, 121 Mass. 404. Other cases also hold that latent equities cannot be asserted. Bigelow v. Smith, 2 Allen, 264; Green v. Towne, 8 Met. 411; Hoffman v. Noble, 6 Met. 68.

Michigan.—Michigan adopts the New York view, that latent equities may be asserted against the assignee of a non-negotiable chose. "In case of the assignment of a chose in action not having the attribute of negotiability the assignee takes it subject to antecedent equities. In case of negotiable paper the law protects a *bona fide* purchaser for value from prior equities." Spinning v. Sullivan, 48 Mich. 5.

Minnesota.—No decisions found.

Mississippi.—This state protects the assignee from latent equities. "The assignee of a judgment is bound by the equities to which it was subject in the hands of the assignor, but not subject to those claimed by a third person against the assignor." The court refers also to Chancellor Kent's opinion. Duke v. Clark, 58 Miss. 465.

Missouri.—Missouri protects the assignee from secret equities. "An innocent purchaser of a judgment, for value and without notice, takes free from all latent equities." Garland v. Harrison, 17 Mo. 282.

Nebraska.—Nebraska adopts the view of the majority of jurisdictions and protects the assignee from the invisible and latent equities. "The assignee of a non-negotiable chose stands in the shoes of his assignor as to all equities existing between the original parties, but this does not apply as to equities between the assignor and a third person of which the assignee had no notice." The Nebraska court makes reference to Chancellor Kent's view and says: "The weight of authority is favorable to the foregoing rule and the reasons given for it are satisfactory; hence we will adopt it." Williams v. Donnelly, 54 Neb. 193. See also First Natl. Bank v. Edgar, 65 Neb. 340.

New Hampshire.—New Hampshire follows New York and subjects the assignee to latent equities. "The assignee of such chose has no greater right than his assignor." Clark v. Whitaker, 50 N. H. 474.

New Jersey.—New Jersey holds in several clear-cut and well-reasoned decisions that such latent equities cannot be asserted against the *bona fide* assignee. "Such secret equities do not affect the assignee (of a bond and mortgage) for the reason that it was not within the compass of any inquiry the assignee could make to discover such equity." Losey v. Simpson, 11 N. J. Eq. 246. Other New Jersey courts hold likewise. Starr v. Hoskins, 26 N. J. Eq. 414; Danbury v. Sahnison, 11 N. J. Eq. 213; Putnam v. Clark, 29 N. J. Eq. 412; Vredenburgh v. Burnet, 31 N. J. Eq. 229. In this latter case the court holds: "No caution or diligence of the most careful purchaser will enable him to discover a secret equity, and unless he has notice he will not be bound by it."

New York. — New York leads the jurisdictions which refuse to protect the assignee from latent equities. "A mortgage in the hands of a *bona fide* assignee is subject to all the equities existing between the original assignor and his assignee." Other New York cases also refuse protection to the assignee. Schaefer v. Reilly, 50 N. Y. 61; Trustees Union College v. Wheeler, 61 N. Y. 88; Green v. Warwick, 64 N. Y. 220; Davies v. Beckteni, 69 N. Y. 440; Owen v. Evans, 134 N. Y. 514.

North Carolina.—North Carolina refuses to subject the assignee to latent equities. "The assignee of the judgment, who took without notice of the agreement between the original parties, is not bound by such an equity." Le Duc v. Slocomb, 124 N. Car. 347.

North Dakota.—No decisions found.

Ohio.—Ohio follows New Jersey and protects the assignee. "The assignee of a mortgage is not bound by secret equities, of which he had no notice at the time of the assignment." Schwartz v. Leitz, 13 Ohio St. 419.

Oregon.—No decisions found.

Pennsylvania.—Pennsylvania courts adopt the Ohio and New Jersey view. "The *bona fide* purchaser of a mortgage for value and without notice, is discharged from all such secret equities." Pryor v. Wood, 31 Pa. St. 142. "The assignee of a judgment is not subject to the latent equities of third persons." Mifflin's Appeal, 98 Pa. St. 150; Koontz v. Kirkpatrick, 72 Pa. St. 376; McMasters v. Wilbum, 85 Pa. St. 218.

Rhode Island.—No decisions found.

South Carolina.—In Taylor & Co. v. Segler, 24 S. Car. 387, the South Carolina court holds that the

assignee is protected. "The assignee had no knowledge nor facts sufficient to put him upon inquiry, and as an innocent assignee of the judgment he is not bound by antecedent equities."

South Dakota.—No decisions found.

Tennessee.—Tennessee follows New York and holds the assignee bound by latent equities. "The assignee of the non-negotiable claim has only the rights of the assignor." Trabue v. Bankhead, 2 Tenn. Ch. 412.

Texas.—Texas protects the assignee. "No equities between the assignor and third parties can affect a *bona fide* purchaser for value, without notice." Howman v. Keigwin, 39 Tex. 34.

Vermont.—Vermont follows New York and subjects the assignee to all latent equities. Concerning the assignment of a judgment, the court holds: "The assignee takes the judgment subject to equities residing in third persons against the assignor. The assignee stands in exactly the same position as the assignor, as to equities arising upon the chose. He must be taken to be cognizant of them. It his duty to make inquiries." Downer v. South Royalton Bank, 39 Vt. 25; Loomis v. Loomis, 26 Vt. 198; Barney v. Grover, 28 Vt. 391.

Virginia.—Virginia holds that the assignee has no means of ascertaining latent equities and is not bound by them. "The assignee of a bond is subject to the equities of the obligor, but not to the equities of some third person." Moore v. Holcomb, 24 Am. Dec. 683.

Washington.—Washington protects the assignee, after an elaborate review of the authorities. "The mortgagee is only bound by the equities of the mortgagor and not those of third parties." Church Soc. v. Church, 64 Pac. Rep. 750.

West Virginia.—No decisions found.

Wisconsin.—Wisconsin follows New Jersey, Nebraska, Pennsylvania, Ohio and Illinois. "The assignee of a mortgage is not bound by latent equities in third parties." "The contention that the mortgage was taken subject to all equities is incorrect." Craft v. Bruster, 9 Wis. 457.

Wyoming.—No decisions found.

CRIMINAL LAW—PRINCIPALS AND ACCESSORIES—CONVICTION OF PRINCIPAL.

REED v. COMMONWEALTH.

Court of Appeals of Kentucky, March 19, 1907.

Ky. St. 1903, § 1128, provides that, in all felonies, accessories before the fact shall be liable to the same punishment as principals, and may be prosecuted jointly with principals or severally, though the principal be not taken or tried unless otherwise provided. Held, that where an indictment charged that decedent was shot and killed by D, but that defendant and another were present at the time and "did aid, abet, unlawfully, feloniously, and of their malice aforethought, assist and encourage" D to do the killing, defendant might be tried and convicted, though D, the principal in the first degree, had been tried and acquitted.

SETTLE, J.: Nathan Day, Edgar Patrick, and the appellant, Newton Reed, were jointly indicted by the grand jury of Morgan county for the murder of Charles Frisby. Day was separately tried for and acquitted of the crime charged. The indictment as to Patrick was filed away on motion of the commonwealth's attorney. The appellant, Newton Reed, was accorded a separate trial, which resulted in his conviction of the crime of voluntary manslaughter at the hands of the jury, and their fixing his punishment at confinement in the penitentiary for a period of two years. He was refused a new trial, and by this appeal seeks a reversal of the judgment of conviction.

The indictment charged that Frisby was shot and killed by Day, but that Patrick and appellant were at the time present, and "did aid, abet, unlawfully, feloniously, and of their malice aforethought, assist, and encourage the said Nathan Day to do the killing." As shown by the bill of evidence, the material facts were that Day, as town marshal, had arrested Frisby for disorderly conduct in the forenoon of the day of the homicide, but released him upon his promise to go home and behave himself. Frisby then went home, but returned to the town in the afternoon, and on the way told a witness, who testified in appellant's behalf on the trial, that he had submitted to arrest that morning because he did not then have his pistol, but, having secured it, he would not again submit to arrest. In the afternoon he fired his pistol on a street of the town in view of and about 100 yards from the marshal, Day, and the chairman of the town council. The latter, claiming authority under the law to act as judge, *ex officio*, of the police court in the absence of the regular judge, who on that occasion, was out of town, ordered the marshal, Day, to immediately arrest Frisby, which he proceeded to do, after summoning appellant and Patrick as a *posse comitatus* to assist him. Upon getting within a few yards of Frisby, and before attempting his arrest, Day and his posse were ordered by Frisby, pistol in hand, to stop, which they did. Day then informed Frisby if he would go home he would not arrest him. Frisby, instead of promising to go home, told appellant, who was a little in adavance of the others of his party, to go back, which he started to do, acccompanied by Day and Patrick. At that juncture, Frisby, who was in the street with one Keeton, made some exclamation, threw his hat on the ground, and fired his pistol twice in rapid succession. The first shot, though in the direction of Day and his posse, seemed to have been fired by Frisby in the ground, but the evidence strongly conduced to prove that the second shot was fired at the marshal and his posse, all of whom then began shooting at Frisby, who continued to shoot at them. As the shooting progressed, the marshal and his possee advanced upon Frisby, who ran behind a building, followed by appellent; Day and Patrick going on the other side of the building to intercept Frisby. After getting behind the building, Frisby "broke" his pistol, apparently to rid the cylinder of the exploded cartridges and reload it. A bystander, observing this act, called to appellant to run upon

and capture Frisby before he could reload his pistol. Appellant attempted to take his advice, but Frisby ran to a fence as if to climb over it and escape through an adjoining lot, seeing which appellant, as some of the witnesses testified, shot at him twice. About the same time Day and Patrick, who had entered the lot from the other side of the building, also shot at Frisby. When the latter reached the fence he fell, mortally wounded, and in a few minutes died.

Appellant admitted on the witness stand that he shot at Frisby more than once before he ran behind the building, but denied that he fired upon him afterwards. This denial was supported by at least two witnesses introduced in his behalf. Upon this point, however, the evidence was conflicting, for several bystanders testified that appellant did shoot at Frisby after he followed him behind the building, and it is argued in the brief of the assistant attorney general that Frisby was shot and killed by appellant, though it is equally apparent from the evidence that both Day and Patrick shot at him after he ran behind the building. Counsel's contention that appellant fired the fatal shots rests upon the theory that they were received by deceased in the back, and that his back was toward appellant, when, as some of the witnesses stated, the latter shot at him behind the building. There was, however, one fact established by the evidence that apparently militates against this theory, which is that the wounds upon the body of the deceased seemed to have been made by bullets from a 38 pistol, which was the caliber of the pistols used by Day and Patrick, respectively; whereas, the two pistols used by appellant on that occasion—one in each hand—were of 44 and 45 caliber, respectively.

While there can be no doubt from the evidence that appellant, Day, and Patrick each shot at deceased, it is difficult to determine whether the fatal shots were fired by Day and Patrick, or one of them, or whether they were fired by appellant. It is, however, insisted for appellant that he was only a principal in the second degree in committing the homicide, and, in view of the acquittal of Day, named in the indictment as the slayer of Frisby, the jury should have been peremptorily instructed by the trial judge to acquit appellant. This contention is unsound. No better statement of the law on the subject here presented can be announced than is found in Roberson's Kentucky Criminal Law, Vol. 1, § 78, wherein it is said: "The distinction between principal in the first and second degree is of no practical importance. All the offenders may be included in the same indictment, which may charge the offense as done generally by all, or especially as done by one and abetted by the rest. Thus, if two or more persons are indicted as the actual perpetrators of a crime, they may be convicted as principals in the first degree, although some of them were merely aiders and abettors. So, when two persons are jointly indicted, the one as principal and the other as aider and abettor, the one charged as principal may be found guilty of aiding and abetting, and the one charged as aider and abettor may be found guilty as principal. This is for the reason that each is the agent and instrument of the other. There is in law but one crime. Hence each, although performing different parts, is, in law, a principal, and is criminally responsible for the act of the other, as well as his own act. The aider and abettor may be indicted alone; but, in that case, the indictment must disclose the name of the principal, and give a discription of his acts, because the aider and abettor, being a principal of the second degree, cannot be guilty of crime unless the principal of the first degree actually perpetrated the act. Hence, to make a man a principal in the second degree, there must be a principal in the first degree to perpetrate the main fact. One cannot, therefore, be aider and abettor of himself. Two or more persons must act. But if the party indicted as aider and abettor was the perpetrator of the crime, if his act completed it, then, of course, the rule that the indictment must include the principal actor jointly, or disclose who he is, together with a description of his acts, does not apply. The principal in the second degree may be tried before the principal in the first degree. So, the party charged as principal in the second degree may be convicted, though the party charged as principal in the first degree is acquitted."

We find that the doctrine announced by Roberson has been approved by this court in numerous cases. One of the best considered of these is Benge v. Commonwealth, 92 Ky. 1, 17 S. W. Rep. 146. The appellant Benge, Jere Hampton, and others were indicted for the murder of Joseph Bowling by cutting him with a knife; Hampton being charged in the indictment as the perpetrator of the deed, and appellant Benge and the other defendants as aiders and abettors. The facts stated in the opinion are strikingly like those of the case at bar, for they conduce to prove that Benge, though charged as aider and abettor, actually did the cutting that caused Bowling's death. It was contended by Benge that, inasmuch as he was only indicted as an aider and abettor, the trial court erred in instructing the jury that he might be convicted as an actual perpetrator of the deed. The court, speaking through Judge Bennett, in passing on this objection, said: "This contention is a mistaken view of the law. * * * There is but one crime charged—that of murder by all the defendants. It is true the prosecution goes upon the theory that the appellant and Jere Hampton committed different parts of the crime; the appellant committing a dependent part, which was not criminal unless the deed itself was actually perpetrated. But, nevertheless, there is in law but one crime charged, and the separate parts performed by each constitute, in legal contemplation, the joint act of all. Each is the agent and instrument of the other. Hence each, although performing different parts, the aider and abettor be-

ing a dependent part, is, in law, a principal, and is criminally responsible for the other as well as for his own act. The one charged as principal may be found guilty of aiding and abetting, and the one charged as aider and abettor may be found guilty as principal. This is for the reason that each is the instrument and agent of the other, and his act is the act of the other, and the act of each constitutes but one crime, and each is guilty of the act actually committed by the other. Such act is in law the act of each, although he did not actually perpetrate each act; but the act that the other perpetrated was his act, and he is principal as to it. Now, the actual perpetrator of the deed being the agent and instrument of the aider and abettor for which the latter is criminally responsible, it follows that he is equally responsible, under the indictment, if he actually perpetrated the deed, instead of the person charged in the indictment to have done so, although he is indicted as aider and abettor only. State v. Putman, 44 Am. Rep. 569, 18 S. Car. 175; State v. Ross, 29 Mo. 37. The Criminal Code of Practice (section 122) provides: 'The indictment must contain a statement of the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended.' Here, the indictment charges in ordinary and concise language, the part that the principal and aider and abettor took in the murder; and as each, in law, was principal, and could be convicted under the indictment for doing the acts that the indictment imputed to the other, the indictment is sufficient to authorize the conviction. * * *"

In Evans v. Commonwealth, 12 S. W. Rep. 768, 11 Ky. Law Rep. 573, the appellant was jointly indicted with others for the crime of house-burning. The jury were instructed that, if the burning was done by either of the persons indicted with appellant, and he was present, aiding or abetting, they should convict him. This instruction was approved by this court, in the following language: "The indictment charges the accused with the burning. It does not speak of aiding or abetting. If, however, the torch was applied by a codefendant of the accused, and he was then present, aiding and abetting, he was, under our law a principal, and the indictment therefore authorized such an instruction."

The authorities *supra* are fully supported by the following cases: Gaskins v. Commonwealth, 30 S. W. Rep. 1017, 97 Ky. 494; Young v. Commonwealth, 8 Bush, 366; Thompson v. Commonwealth, 1 Metc. 13; Travis v. Commonwealth, 96 Ky. 77, 27 S. W. Rep. 863; Boyd v. State, 17 Ga. 194; Brown v. State, 28 Ga. 216; Commonwealth v. Hargis (Ky.), 99 S. W. Rep. 348. The opinion in the case of Mulligan v. Commonwealth, 84 Ky. 229, 1 S. W. Rep. 417, does not conflict with any conclusion expressed in the authorities, *supra*. Mulligan was indicted alone for the crime of detaining a woman against her will, with the intent to have carnal knowledge of her. The evidence conduced to prove that the crime was committed by three persons, and more strongly tended to show that the appellant was only an aider and abettor, in view of which this court held that, in order to convict one as an aider and abettor in committing the crime of rape, the principal must be indicted jointly with him, or, if he be indicted alone, the indictment must disclose the name of the principal and give a description of his acts. The opinion of Mulligan v. Commonwealth was also written by Judge Bennett, and in Benge v. Commonwealth, *supra*, it is referred to and distinguished from that case. In the case at bar, as in the Benge case, the person charged as a principal, as well as the aider and abettor, was indicted, and his alleged acts set forth in the indictment, which acts are in law also the acts of the aider and abettor. If, as the evidence conduced to prove, the homicide was actually committed by appellant, indicted as aider and abettor, instead of by Day, named in the indictment as the principal, he only did with his own hand what the indictment charged him with doing by the hand of another, and the acquittal of the alleged principal, even upon the ground that he was not a participant in the homicide, did not entitle appellant to have the jury peremptorily instructed to acquit him.

Ky. St. 1903, § 1128, provides: "In all felonies, accessories before the fact shall be liable to the same punishment as principals, and may be prosecuted jointly with principals, or severally, though the principal be not taken or tried, unless otherwise provided in this chapter." In construing the statute, *supra*, this court said, in Commonwealth v. Hicks, 82 S. W. Rep. 265, 118 Ky. 637: "The very object of the statute is to make the punishment of the accessory entirely independent of the conviction or punishment of his principal." While such is undoubtedly the object of the statute, it is likewise true that, in order to convict an accessory, whether before or after the fact, it is necessary to establish the guilt of the principal. At any rate, this seems to be the conclusion expressed in Begley v. Commonwealth, 82 S. W. Rep. 285, 26 Ky. Law Rep. 598, in the opinion of which, after quoting the above statement from Commonwealth v. Hicks, *supra*, it is said: "So in this view of the statute (and we think it susceptible of no other construction), it is clear that the conviction of appellant could not be made to depend on that of the principals, or any of them, or even upon their being in custody, although, in order to convict as an accessory before the fact, it was necessary upon his trial for the commonwealth to establish the guilt of the principals, or some of them, of the crime which he procured them to commit."

The statute was intended to abrogate the rule of the common law which required the principal, to be disposed of before the accessory. An accessory is one who is not the chief actor in the offense, nor present at its commission, but is in some way concerned therein, either before or after

its commission. There can be no accessory to a crime, unless the crime is in fact committed; nor can one be guilty as accessory, unless the principal is guilty. Hence the statute does not declare that the accessory may be convicted, although the principal be not guilty. It goes no farther than to say that the former may be prosecuted jointly with the principal, or separately, though the latter be not "taken or tried." The statute does not therefore relieve the commonwealth of the duty of proving the guilt of the principal—the actual perpetrator of the crime—in order to convict the accessory. No reason exists, however, for applying this rule to an aider and abettor, who, unlike the accessory, is present when the crime is committed, and in addition makes himself an active participant in its commission. In such case the aider and abettor is equally guilty with the one charged as committing the crime. For, as already stated, each is the agent and instrument of the other. There is in law but one crime. Hence each, although performing different parts, is in law a principal, and is criminally responsible for the act of the other, as well as his own act. For these reasons, the aider and abettor may, as in the case of the accessory, be tried and convicted before the principal in the first degree is taken and tried, and in addition may be convicted, though the principal in the first degree be acquitted. If correct in the conclusions so far expressed in the opinion (and of their correctness we have no doubt), it is patent that the lower court did not err in refusing to give the peremptory instruction asked by appellant. The case should have gone to the jury upon the evidence introduced by the commonwealth and the appellant, thereby leaving it to them to decide whether appellant was guilty or innocent of the crime charged.

We have considered the objections urged to the instructions that were given the jury by the court. The instructions are, in some respects, inaptly expressed; but, on the whole, they substantially conform to the law, yet do not contain all the law of the case. Another should have been given defining the duty and powers of Day as a peace officer and of the posse acting with him in attempting to arrest Frisby. According to the evidence, Day was attempting to arrest him the second time that day. There can be no doubt from the evidence but that a few minutes before Frisby was killed he committed a breach of the peace by shooting his pistol in the street. It is useless to discuss the power of the acting police judge who saw the act of lawlessness, or to decide whether he had the right, without issuing a warrant for Frisby, to command Marshal Day to arrest him, for the latter had the right as a peace officer to make the arrest without a warrant, and without an order from the acting police judge to do so, as Frisby fired the pistol in his presence and hearing. In view of the turbulent conduct of Frisby throughout the day, the threats that he made against Day for having arrested him in the forenoon, and the fact he was armed, Day had reasonable grounds to apprehend that Frisby would resist a second arrest, and in all probability use his pistol in doing so. Under such circumstances, Day acted properly in summoning appellant and Patrick to assist him to make the arrest. In approaching Frisby Day used the same forbearance toward him that characterized his conduct throughout, telling him that, if he did not go home peaceably, he would have to arrest him for shooting on the street. Instead of complying with this reasonable request, Frisby commanded the officer and his posse to halt, and told them to go back. Believing that Frisby was about to fire on them, Day and his posse started to go away from Frisby, whereupon the latter fired his pistol into the ground, but in the direction of the officer and his posse, and then, according to the weight of the evidence, fired a second shot apparently aimed at them. Day, Patrick, and appellant then began to shoot at Frisby, advancing upon him as they did so, and he continued to shoot at them, but retreated until he reached the building behind which he ran, and near which he was killed.

In arresting one guilty of a misdemeanor, the officer is never justified in killing merely to effect the arrest, and this is true whether the offender be fleeing to avoid arrest or to escape from custody. To kill him in either case would be murder, but, under some circumstances, it may amount only to manslaughter, if it appear that death was not intended. If the officer meet with resistance, he may oppose sufficient force to overcome it, even to the taking of life, provided the offender is resisting to such an extent as to place the officer in danger of loss of life or great bodily harm, and the officer must use no greater force than is reasonably necessary, or apparently so, for his protection, or to prevent the prisoner, if in custody, from effecting his escape by overcoming the officer by violence or force. But, in making an arrest for a felony, a different rule obtains. In that event the officer may use such force as is necessary to arrest the felon, even to the extent of killing him when in flight. This rule also applies to one charged with felony, though he be innocent. But so highly does the law regard human life that, if a felon can be arrested without the taking of his life, yet is slain, the killing will not be excusable. In other words, the killing can be done only of necessity, the existence of which is for the jury to determine. Roberson's Kentucky Criminal Law, vol. 1, § 153; Bishop's Criminal Law, §§ 662, 663; Head v. Martin, 85 Ky. 482, 3 S. W. Rep. 622; Dilger v. Commonwealth, 88 Ky. 550, 11 S. W. Rep. 651; Doolin v. Commonwealth, 95 Ky. 29, 23 S. W. Rep. 663; Bowman v. Commonwealth, 96 Ky. 8, 27 S. W. Rep. 870; Fleetwood v. Commonwealth, 80 Ky. 1; Mockabee v. Commonwealth, 78 Ky. 380; Stevens v. Commonwealth (Ky.), 98 S. W. Rep. 284.

The court should therefore have given an additional instruction embodying the principle refer-

red to, because what would have justified Day, the officer, in shooting or killing Frisby, which amount to justification to appellant as a member of his posse. While the original offense for which the attempt to arrest Frisby was first made was merely a misdemeanor, yet, when he shot at the officer and his posse, as they approached him, or rather as they were leaving him at his command, he became guilty of a felony, to arrest him for which they had the right to use such force as was reasonably necessary, as well as to exercise the right of self defense. And if, under these circumstances, and in order to effect his arrest, the officer or appellant, as a member of his posse, shot and killed Frisby while trying to escape, it was excusable in law. The failure, therefore, of the court to give such an instruction as we have indicated, was necessarily prejudicial to appellant, and doubtless prevented him from having a fair trial.

For the reasons indicated, the judgment is reversed, and cause remanded for a new trial and further proceedings consistent with the opinion. Whole court sitting.

NOTE. — *Position of Abettor and Accessory to a Felony so far as Concerns His Individual Liability.* — Bishop in his great work on Criminal Law (1892), § 629, says: "When two or more persons unite to accomplish a criminal object, whether through the physical volition of one, or of all, proceeding severally or collectively, each individual whose will contributes to the wrongdoing is in law responsible for the whole, the same as though performed by himself alone." The indictment of appellant in the principal case was in terms of the old common law relation to crime which he occupied, to wit, that of "aider and abettor." This relation to a crime is now abandoned in modern statutes and is covered by the term principal in the second degree. Since, however, there is now no distinction as to the degree and individuality of guilt between principals of the first and second degree,—to charge a man as "aider and abettor" to a crime practically charges him as a principal. On this point, which is not always clear to the practitioner, it is interesting to note what Bishop has to say in section 648 of his work on Criminal Law: "The distinction between principals of first and second degrees is without practical effect. It originated in this way: By the ancient law, those only were principals who are now such in the first degree; persons present and abetting being accessories at the fact. When afterward the courts held the latter to be principals, they termed them of the second degree. And now an indictment against one as principal of the first degree is sustained by proof of his being such of the second, and an indictment against one as principal of the second degree is supported by proof that he is of the first. The distinction is in all respects without a difference; and there is no practical reason for retaining it in expositions of the common law." It is, therefore, very apparent from the indictment in the principal case that appellant was indicted not as an "accessory," but as an "aider or abettor," in other words, as a principal, and could therefore be tried separately from other persons charged with the same crime and convicted whether the others were acquitted or not.

An "accessory," as we have seen and as the court makes plain, is quite different from an "aider or abettor," the latter being a principal. An accessory, however, is one who participates in a felony too remotely to be deemed a principal. See Bishop, Criminal Law, § 662. It might be mentioned also that the accessory merely assists in the crime under the direction of a dominating mind which is conceiving and which proposes to execute the crime. He follows as a shadow his principal either before or after his act is committed and can therefore commit no crime apart from his principal. Therefore, the conviction of one as accessory cannot be sustained if the matters charged against the principal do not constitute a crime. Simmons v. State, 4 Ga. 465; Tully v. Commonwealth, 74 Ky. (11 Bush.) 154; Self v. State, 65 Tenn. (6 Baxt.) 244; Armstrong v. State, 28 Tex. App. 526, 13 S. W. Rep. 864. To establish, therefore, the guilt of one charged as accessory before the fact to a felony, the guilt of the principal must first be proved. Ogden v. State, 12 Wis. 532, 78 Am. Dec. 754; Holmes v. Commonwealth, 25 Pa. St. 221. Thus, in the case of Edwards v. State, 80 Ga., 127, 48. E. Rep. 268, defendant was indicted, under Code, § 4489, as an accessory after the fact, for buying and receiving goods stolen by two others, one of whom had fled, the other having been acquitted on the ground of infancy. The court held that, before defendants could be convicted, the state must show that the principal, whether taken or not, is guilty; and the acquittal of one of the principals on the ground of infancy did not relieve the state of this burden. Thus, also, it was said in Boston v. State, 12 Tex. App. 408, that it was not enough that the defendant in that case, charged as an accessory after the fact, harbored A, charged with murder, unless it were also shown that A committed the murder. It is apparent from the authorities cited that an accessory to a felony cannot be prosecuted for a substantive offense, but only as an accessory to the crime of the principal felon. Thus upon the trial of the accessory, therefore, the commission of the substantive offense by the principal felon must be proved, but not his conviction therefor. Hatchett v. Commonwealth, 75 Va. 925. Under an act of Nevada, however, similar to the one of Kentucky quoted by the court in the principal case, providing that accessories may be indicted and tried as principals, it is not essential to the conviction of accessories before the fact that the prosecution first prove the guilt of the principal. It is only necessary in such case to show that a crime has been committed, and that defendant, if present, aided and assisted, or, if not present, advised or encouraged it. State v. Jones, 7 Nev. 408.

This brings us to the question of the effect of the acquittal of the principal. At common law and in those states which adhere to it no accessory can be convicted subsequent to the acquittal of his principal; indeed, he could only be convicted with or after his principal. Bowen v. State, 25 Fla. 645, 6 So. Rep. 459; State v. Pybass, 4 Humph. 442; United States v. Crane, 4 McLean, 317; McCarty v. State, 44 Ind. 214; Brown v. State, 18 Ohio St. 496; Smith v. State, 46 Ga, 298; Bishop Criminal Law, § 667. Modern statutes, however, in most of the states as in Kentucky, have changed the common law to the extent at least of permitting an accessory to be tried independent of his principal, and in many other states the legislature has gone to the extent of making accessories either before or after the fact guilty as principals, thus practically abolishing the common law distinction between principals and accessories. In such cases, of course, an

accessory may be convicted independent of the acquittal of his principal, he being in the eyes of the law a principal also. State v. Phillips, 24 Mo. 475; State v. Ricker, 29 Me. 84; People v. Buckland, 13 Wend. 592; State v. Cassaday, 12 Kan. 550; Brandt v. Commonwealth, 94 Pa. 290; State v. Buzzell, 59 N. H. 65; State v. Jones, 7 Nev. 408; Noland v. State, 19 Ohio, 131; People v. Campbell, 40 Cal. 129; Stricklin v. Commonwealth, 83 Ky. 566.

JETSAM AND FLOTSAM.

LYNCHING—INDICTMENT IN ANOTHER COUNTY.

A novel and commendable departure in criminal procedure is shown by a statute of North Carolina, recently held to be constitutional by the supreme court of that state (State v. Lewis, 55 S. E. Rep. 600), which provides that indictments for lynching shall be found by the grand jury of a county adjoining that in which the crime is committed. Of the justice and wisdom of this statute there can be no question. A grand jury of the vicinage will be reluctant to indict, and a petit jury, selected by that combination of chance and elimination which prevails generally in this country, will rarely convict the guilty parties, no matter how clear the evidence; as a consequence, punishment is almost unknown. It is to be regretted that our constitutional provision for trial by a jury of the vicinage would prevent the adoption of a similar statute in this state.

In the absence of such a provision in the constitution of North Carolina, the statute was challenged under the federal constitution as not due process of law, on the theory that at common law, an offender could be tried only in the county where the crime was committed, and that due process of law meant the process of the common law as it existed at the time of the separation of the two countries. That narrow view, which would sanction trial by battle, has, unfortunately met with some recognition by the courts, but happily not by all. These same courts have held that because the English jury consisted of twelve men, that number is a sacred part of the system of trial by jury, though the Supreme Court of the United States has held otherwise. Maxwell v. Dow, 176 U. S. 581. The unanimous verdict, which is certainly the most objectionable feature of trial by jury, we believe has been generally held to be a necessary feature.

The correct view of the scope and limitations of this constitutional provision cannot be better stated than in the language of the Harvard Law Review in commenting on this decision:

"It seems clear that when the constitution guaranteed to the citizen 'due process of law,' it did not crystallize the then common law procedure and adopt it as if such procedure had been specifically described. The provision leaves a wider scope. It was intended to protect the individual from the arbitrary exercise of the powers of government. But so long as the substantial rights of the citizens were not invaded, the forms by which he was to be protected might be modified to suit new conditions. So even if the present statute were not proper as prescribing an ancient procedure, it seems clearly to fall within this general power."—*National Corporation Reporter.*

BOOK REVIEWS.

LOVELAND ON BANKRUPTCY.

No subject is of more vital importance to the commercial lawyer than that of bankruptcy, nor is there a subject of law concerning which it is so necessary that he shall have the latest authorities and the most accurate advice concerning the trend of the decisions and the forms established by law. Moreover, there is no subject of law which changes so frequently, and concerning which, therefore, the "latest authorities" are the only valuable authorities. With such considerations in view we feel very confident in predicting a most favorable reception on the part of the bar of the country for the third edition of Mr. Frank O. Loveland's treatise on the Law and Proceedings in Bankruptcy. The author of this work is well known to the profession and has attained a very enviable reputation as a law writer. Besides being a lawyer of ability, he is clerk of the United States Circuit Court of Appeals for the sixth circuit and is probably the most accurately informed official on federal procedure in the United States, his work on "Forms of Federal Practice" being the recognized authority on federal court forms. Mr. Loveland's work on bankruptcy bears the stamp of consummate accuracy and a thorough knowledge of the principles of law which govern the decisions on the subject matter of the law of which it treats. This fact combined with the no less important consideration that the work is absolutely exhaustive of the authorities and accessible in its arrangement conduces to exalt this work to the place of superior desirability as an authority for the active practitioner, who needs a work on a subject matter so frequently referred to as that of Bankruptcy, which will give him all the law on a given point when occasion may demand, in the quickest time and with the least exertion and effort at investigation. From our own personal use of Mr. Loveland's work on Bankruptcy we can most confidently affirm that it performs these most unusual and important requirements more perfectly than any other text book on bankruptcy which we have consulted. Three years have passed since the second edition of this work was published, but on a subject of law as active and changeable as bankruptcy, that period is enough to end the active influence of a text book on that subject. During these three years, the author informs us, more than two thousand opinions in bankruptcy cases have been reported in the books. One of the most important features in the changes that have occurred in the law of bankruptcy during the last three years, is the fact that many of the most important questions concerning which the courts of bankruptcy have held conflicting views, have been definitely settled by the Supreme Court of the United States. All of these changes are carefully chronicled in Mr. Loveland's treatise, and the practical lawyer will find in this work everything he desires in a serviceable working tool in his practice in bankruptcy.

Printed in one volume of 1567 pages, and published by The W. H. Anderson Company, Cincinnati, Ohio

BOOKS RECEIVED.

The Annotated Statutes of the State of Missouri. 1906. Embracing the general laws in force December 31, 1906, incorporating under the headings of

the Revised Statutes of 1899 the subsequent enactments, with full notes of the pertinent decisions of the Supreme Courts and Courts of Appeals. Compiled and Annotated by members of the editorial staff of the National Reporter System. In five volumes. St. Paul, Minn. West Pupblishing Company, 1906. Review will follow.

Cyclopaedia of Law and Procedure. William Mack, Epitor-in-Chief. Volume 24. New Yofk. The American Law Book Company. 1907. Review will follow.

The American Digest Annotated, Continuing without omission or duplication the Century Edition of the American Digest, 1658 to 1896. 1906 B. A Digest of all Current Decisions of all the American Courts, as Reported in the National Reporter System, the Official Reports, and elsewhere, together with important English Cases, from April 1, 1906, to September 30, 1906, and Digested in the Bimonthly Advance Sheets for June, August, and October, 1906 (Nos. 191-193). Prepared and Edited by the Editorial Staff of the American Digest System. St. Paul, Minn. West Publishing Co., 1907. Review will follow.

HUMOR OF THE LAW.

It is said of a noted Virginia judge that in a pinch he always came out ahead. An incident of his childhood might go to prove this.

"Well, Benny," said his father, when the lad had been going to school about a month, "what did you learn today?"

"About the mouse, father."

"Spell mouse," his father asked.

After a little pause, Benny answered, "Father, I I don't believe it was a mouse after all, it was a rat."

While on his way recently to Burlington, Vt., to visit relatives, Judge Brewer related the following incident:

"An amusing thing took place in Washington in connection with the supreme court this last winter. There was a young man in the court room who was talking out loud, making a little confusion, and one of the old colored bailiffs that we have there went in and led him out and said: 'Young man, you want to come out and be still. That is the Supreme Court of the United States in there! If they get after you, nobody in the world could help you! Nobody could help you—except the Almighty—and the chances are He won't interfere!'"

The lawyer whose honesty is proved has the confidence of the judge and jury. A story of Abraham Lincoln is an illustration. He was appointed to defend one charged with murder. The crime was a brutal one; the evidence entirely circumstantial; the accused a stranger. Feeling was high and against the friendless defendant. On the trial Lincoln drew from the witnesses statements of what they saw and knew. There was no effort to confuse, no attempt to place before the jury the facts other than they were. In the argument after calling attention to the fact that there was no direct testimony, Lincoln reviewed the circumstances, and after conceding that this and that seemed to point to defendant's guilt, closed by saying that he had reflected much on the case, and while it seemed probable that defendant was guilty, he was not sure; and looking the jury straight in the face said: "Are you?" The defendant was acquitted, and afterwards the real criminal was detected and punished. How different would have been the conduct of many lawyers. Some would have striven to lead the judge into technical errors, with a view to an appeal to a higher court. Others would have become hoarse in denunciation of witnesses, decrying the lack of positive testimony and the marvelous virtue of a reasonable doubt. The simple, straightforward way of Lincoln, backed by the confidence of the jury, won.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACKNOWLEDGMENT—Authority to Take.—A notary held not disqualified, by interest of a firm of which he was a member, to take an acknowledgment to a mechanic's lien contract.—Roane v. Murphy, Tex., 96 S. W. Rep. 782.

2. ACTION—Sale or Mortgage. — Where property, belonging to two persons in severalty, was conveyed by absolute deeds to secure a single indebtedness, a single suit was maintainable to have all such conveyances declared mortgages, and to compel redemption.—Wadleigh v. Phelps, Cal., 87 Pac. Rep. 93.

3. ADVERSE POSSESSION—Constructive Possession.—The principle that an owner in actual possession of a portion of land, claiming title to the whole, has the constructive possession of all the land, held not applicable where an intruder claims land against another.—Morris v. Jacks, Tex., 96 S. W. Rep. 637.

4. ADVERSE POSSESSION—Occupancy.—An occasional cutting of timber from land claimed by defendants since 1877, but not shown to have been occupied by any person, was insufficient to invest them with title by adverse possession.—Auxier v. Herald, Ky., 96 S. W. Rep. 915.

5. ADVERSE POSSESSION—Statute of Limitations —To acquire title under the 20-year statute of limitations it is essential that the occupancy shall be under claim of title or ownership.—Page v. Bellamy, Ill., 78 N. E. Rep. 938.

6. APPEAL AND ERROR—Finding of Chancellor.—Where the proof is conflicting on the whole case or the mind is left in doubt as to the truth, the court on appeal will not disturb the chancellor's judgment.—Wisdom v. Nichols & Shepherd Co., Ky., 97 S. W. Rep. 18.

7. APPEAL AND ERROR—Findings of Trial Court.—The court on appeal in a suit for the settlement of a partnership held not authorized to disturb the judgment where the account books of the partnership produced in the lower court were not brought up on appeal.—Combs v. Combs, Ky., 96 S. W. Rep. 589.

8. APPEAL AND ERROR—Prejudice.—In an action on an assessment for street improvement, a property owner was not prejudiced by the fact that the judgment covered only a part of his lot and that no personal judgment was rendered against him.—Lindsay v. Brawner, Ky., 97 S. W. Rep. 1.

9. APPEAL AND ERROR — Remand.—On remand of cause, trial court held to have properly refused to permit amendment to pleadings, and to have entered judgment without new trial.—Noble v. Tipton, Ill., 78 N. E. Rep. 927.

10. ARBITRATION AND AWARD—Conformity to Submission.—Where an agreement to arbitrate contains no mention of a certain matter in dispute, the determination of the arbitrator of such matter is void.—W. G. Duncan Coal Co. v. David Duncan & Co., Ky., 97 S. W. Rep. 43.

11. ASSAULT AND BATTERY—Provocation.—Provocation or unnecessary force in resisting an attack held necessary to render guilty of assault the first one struck in a combat.—Money v. State, Tex., 97 S. W. Rep. 90.

12. ASSIGNMENTS FOR THE BENEFIT OF CREDITORS—Release of Claims.—A trust deed of a debtor's property for the benefit of his creditors held not void because of a condition that the creditors should only receive their *pro rata* on executing a release of all claims against the debtor.—McAvoy v. Jennings, Wash., 87 Pac. Rep. 53.

13. BANKRUPTCY—Accounts of Receiver.—A receiver in bankruptcy is entitled to a reasonable allowance for the services of counsel employed by him in administering the estate while in his hands, but he has nothing to do with the payment or allowance of fees for counsel for the petitioning creditors for services rendered in instituting the proceedings or otherwise primarily for the benefit of his clients.—*In re* Oppenheimer, U. S. D. C., M. D. Pa., 146 Fed. Rep. 140.

14. BANKRUPTCY—Discharge.—Where employees of a partnership had general authority to obtain loans for the firm on securities a transfer by such employees of stocks belonging to the firm by way of pledge for such a loan was the act of the partners, and, if made within four months prior to their bankruptcy and with intent to defraud their creditors, would defeat their right to a discharge.—*In re* Jacob Berry & Co., U. S. D. C., S. D. N. Y., 146 Fed. Rep. 623.

15. BANKRUPTCY—Estoppel to Assert Equitable Title.—The real equitable owners of lands standing in the name of a bankrupt held estopped by a decree obtained with their consent quieting the title in him absolutely and enjoining them from questioning the same to assert any equity or trust therein which would prevent such lands and the proceeds of those sold from passing to the bankrupt's trustee.—*In re* Coffin, U. S. D. C., D. Conn., 146 Fed. Rep. 181.

16. BANKRUPTCY—Objections to Discharge.—The burden of proof rests upon a creditor objecting to the discharge of a bankrupt and while the acts charged may be established by inference from the facts proved it is not sufficient that such facts justify a suspicion of fraud but they must be inconsistent with honesty and good faith.—*In re* Kolster, U. S. D. C., D. Nev., 146 Fed. Rep. 188.

17. BANKRUPTCY—Surrender of Preference.—A payment made by an insolvent to a creditor on account within the four months period as the last of the transactions between the parties held a preference which must be surrendered before proof of the creditor's claim in bankruptcy.—*In re* Watkinson, U. S. D. C., E. D. Pa., 146 Fed. Rep. 142.

18. BANKS AND BANKING—Ratification of Contract.—The institution by a bank of a suit based on a lease executed by its vice president, being a ratification of his act, his authority to execute it cannot be assailed in the suit.—Lechenger v. Merchants' Nat. Bank, Tex., 96 S. W. Rep. 638.

19. BENEFIT SOCIETIES—Vested Interest of Beneficiary.—A beneficiary in a mutual benefit certificate held to have died the owner of a vested interest in the certificate, so that the fund accruing on the death of the member passed to her distributees.—Simms v. Randall, Tenn., 96 S. W. Rep. 971.

20. BILLS AND NOTES—Payment.—Knowledge that a note, which was paid with an attorney's fees and costs, was not due when paid, held to preclude an action for such fees and costs on the ground of misrepresentation as to an extension of the note.—Collins v. Kelsey, Tex., 97 S. W. Rep. 122.

21. BROKERS—Commissions.—A broker employed to procure an exchange of land for a stock of merchandise for a commission on the trade, held entitled to a commission on the value of the land received in exchange.—Davidson v. Wills, Tex., 96 S. W. Rep. 634.

22. CANCELLATION OF INSTRUMENTS — Joint Conveyances.—The court may adjudge that a joint conveyance of two persons, each owning an undivided interest in the land, is invalid as to one of them for fraud, etc., and valid as to the other.—Shepherd v. Turner, Ky., 97 S. W. Rep. 41.

23. CARRIERS—Care as to Intoxicated Passenger.—A carrier held not liable for death of an intoxicated passenger on the ground that it had failed to properly care for him.—Thixton's Ex'r v. Illinois Cent. R. Co., Ky., 96 S. W. Rep. 548.

24. CARRIERS—Change of Rates.—Certain interstate carriers held not justified in reclassifying laundry soap in less than carloads so that it should pay 20 per cent. less than third class rates, the classification of soap in car loads and other articles bearing a proportionate rate remaining unchanged.—Interstate Commerce Commission v. Cincinnati, H. & D. Ry. Co., U. S. C. C., S. D. Ohio, 146 Fed. Rep. 559.

25. CARRIERS—Conversion.—Where a carrier becomes liable for damages to goods in transit exceeding the freight bill, the lien of the carrier is extinguished and a refusal to deliver the goods to the consignee constitutes a conversion.—Missouri Pac. R. Co. v. Peru-Van Zandt Implement Co., Kan., 87 Pac. Rep. 80

26. CARRIERS—Killing Animal on Track.—In an action against a railroad company for killing an animal on its track, a judgment against the company must be reversed for failure of the court to consider a proper defense.—Houston & T. C. R. Co. v. Thompson, Tex., 97 S. W. Rep. 106.

27. CARRIERS—Liability of Initial Carrier.—An initial carrier limiting its liability to its own line, has the burden of showing that it duly carried a shipment to the end of its line and turned it over to the connecting carrier.—Illinois Cent. R. Co. v. Stevens, Ky., 96 S. W. Rep. 888.

28. CARRIERS—Negligence.—That a car was derailed held to throw on carrier burden of proof that accident could not have been prevented by the highest degree of care.—Louisville St. Ry. Co. v. Brownfield, Ky., 96 S. W. Rep. 912.

29. CHATTEL MORTGAGES—Description of Property.—A description in a chattel mortgage which will enable third persons to identify the property, aided by inquiries which the mortgage indicates, is sufficient.—Harless v. Jester, Tex., 97 S. W. Rep. 138.

30. COMMERCE—Interstate Commerce.—The sale of pictures and picture frames by an agent acting for his principal in another state, where the pictures were manufactured and shipped to the purchaser, held interstate commerce, and not within Acts 1906, p. 116, imposing a license tax on picture solicitors, etc.—Commonwealth v. Baldwin, Ky., 96 S. W. Rep. 914.

31. CONSTITUTIONAL LAW—License Taxes.—Gen. Laws 1905, p. 336, ch. 141, imposing on railroads an annual tax on their gross receipts, held not to deny to the railroads

the equal protection of the law, in violation of Const. U. S. Amend. art. 14, § 1.—State v. Galveston, H. & S. A. Ry. Co., Tex., 97 S. W. Rep. 71.

32. CONSTITUTIONAL LAW—Police Power.—Act twenty-fifth Legislature (Laws 1897, p. 236, ch. 163) relating to the appointment by cities of a board for the examination of plumbers held not invalid as creating a discrimination against individual plumbers not members of a firm.—Caven v. Coleman, Tex., 96 S. W. Rep. 774.

33. CONSTITUTIONAL LAW — Powers of Constitutional Convention.—The constitutional convention assembled by virtue of Acts 1900-01, p. 224, held to have had no authority to enact an ordinance providing for an additional courthouse in certain counties.—*Ex parte* Birmingham & A. R. Co., Ala., 42 So. Rep. 118.

34. CONSTITUTIONAL LAW—Privileges and Immunities.—The privileges and immunities granted to citizens by U. S. Constitution, Fourteenth Amendment, relates to those rights which are called "fundamental," which belong by right to all citizens of a free government.—Meehan v. Board of Excise Com'rs of New Jersey City, N. J., 64 Atl. Rep. 689.

35. CONSTITUTIONAL LAW—Rights of Bona Fide Purchaser.—A *bona fide* purchaser of negotiable bonds for value before maturity and without notice of any infirmity therein is entitled as an incident to his ownership to transfer the title to another with all the rights with which he is vested, and such right once accrued is one of contract which cannot be destroyed or impaired by state legislation.—Gamble v. Rural Independent School Dist of Allison, U. S. C. C. of App., Eighth Circuit, 146 Fed. Rep. 113.

36. CONTEMPT—Commitment.—Accused, having been committed for his refusal to obey a subpœna *duces tecum* calling for his appearance before a grand jury and having remained recalcitrant until after the grand jury was discharged, he was subject to imprisonment for a specified term.—United States v. Collins, U. S. D. C., D. Oreg., 146 Fed. Rep. 558.

37. CONTRACTS—Tender of Performance.—Where defendant informed plaintiff that he would not carry out a contract to enter into a partnership, plaintiff was absolved from making a tender in order to entitle him to recover for defendant's breach.—Hobbs v. Ray, Ky., 96 S. W. Rep. 589.

38. CORPORATIONS—Management of Corporate Affairs.—The courts cannot, in the absence of fraud, and contrary to the wishes of a majority of the directors and stockholders, regulate the affairs of a corporation acting within the scope of its powers.—Figge v. Bergenthal, Wis., 109 N. W. Rep. 581.

39. CORPORATIONS—Reorganization of Bank.—The liability of a national bank assuming the liabilities of a state bank toward a holder of a certificate of stock in the state bank determined.—Dupoyster v. First Nat. Bank, Ky., 96 S. W. Rep. 830.

40. COUNTIES—Unlawful Appropriation.—The county judge, acting as the county court, held to have power to authorize action by the county attorney to recover funds unlawfully appropriated by the fiscal court, it declining to authorize the action.—Hopkins County v. Givens, Ky., 96 S. W. Rep. 819.

41. COURTS — Appellate Jurisdiction.—The opinion of the appellate court held conclusive in determining whether it has decided new questions of law erroneously so as to authorize a transfer to the supreme court.—Grand Rapids & I. Ry. Co. v. Railroad Commission of Indiana, Ind., 78 N. E. Rep. 981.

42. CRIMINAL TRIAL—Entrapment.—Where the owner of mules, to detect a thief employed a detective to encourage the thief's design, and the act was consummated, it was theft, provided such owner or his agent did not induce the original intent.—Crowder v. State, Tex., 96 S. W. Rep. 934.

43. CRIMINAL TRIAL—Continuance.—Where pending trial accused was attacked by a mob and so shot as to be physically unable to properly present his defense, the denial of his application for a continuance was ground for a new trial.—Sacra v. Commonwealth, Ky., 96 S. W. Rep. 858.

44. CRIMINAL TRIAL — Election Between Counts.—Where an indictment contained two counts charging misdemeanors it was not necessary that the judgment should show on which count accused was convicted.—Bivens v. State, Tex., 97 S. W. Rep. 86.

45. CRIMINAL TRIAL—Homicide.—It is competent for a witness to state the tone of voice used, whether angry or otherwise in a conversation between defendant accused of murder, and his victims.—Campos v. State, Tex., 97 S W. Rep. 100.

46. CRIMINAL TRIAL—Misconduct of Juror.—The supreme court will not ordinarily review the decision of the trial court on the issue of the misconduct of a juror in a criminal case based on contradictory evidence.—Trombley v. State, Ind., 78 N. E. Rep. 976.

47. CRIMINAL TRIAL — Venue.—Where deceased was shot and fatally wounded in one county and died in another, accused was properly charged with the killing in the latter county.—Dutton v. Commonwealth, Ky., 96 S. W. Rep. 556.

48. CUSTOM DUTIES — Thread in Straw Lace.—Cotton thread necessarily used to hold straw lace together is a substantial component and sufficient to affect the classification of the lace —Schmitz v. United States, U. S. C. C. of App., Second Circuit, 146 Fed. Rep. 127.

49. DAMAGES — Breach of Contract. — Damages for breach of contract to furnish lumber to dress to the capacity of the mill held not limitable to what it would be had defendants furnished a certain kind only, in which case some of the machines would not be used.—Beekman Lumber Co. v. Kittrell, Ark., 96 S. W. Rep. 988.

50. DAMAGES—Injuries to Wife.—In an action for injuries to plaintiff's wife, plaintiff can testify that her condition since her injury was such that he could not leave her alone at night, though not specifically alleged.—Gulf, C. & S. F. Ry. Co. v. Booth, Tex., 97 S. W. Rep. 128.

51. DEDICATION — Public as Grantee.—A common-law dedication does not require that there shall be a grantee or well-defined body politic for whose benefit the dedication is made.—Nelson v. Randolph, Ill., 78 N. E. Rep. 914.

52. DEEDS—Delivery.—Where a deed was not delivered in the grantor's lifetime, it could not be rendered effective as a conveyance by his widow executing and delivering it after the grantor's death.—Jolly v. Graham, Ill., 78 N. E. Rep. 919.

53. DISORDERLY HOUSE—Evidence.—On trial for permitting the use for disorderly purposes of a frame building owned and controlled by the defendant, situated on a certain lot in a town, absence of evidence that defendant owned or controlled any building on such lot is fatal to conviction.—Oligschlager v. Territory of Oklahoma, U. S. C. C. of App., Eighth Circuit, 146 Fed. Rep. 131.

54. EASEMENTS—Duration of Use.—Where a landowner has, over a long period of years, used a passway over adjoining land, slight evidence held sufficient to show that it was enjoyed under a claim of right.—Schwer v. Martin, Ky., 97 S. W. Rep. 12.

55. EASEMENTS—Right of Way.—The use of a passway over land for many years by the owner of an adjoining tract creates a presumption of a grant.—Sparks v. Rogers, Ky., 97 S. W. Rep. 11.

56. ELECTIONS—Nominations by Petition.—A candidate for a county office held entitled to have his name on the ballot by petition without complying with Ky. St. 1903, § 1454, relating to candidates nominated by party and by petition.—Eversole v. Holliday, Ky., 96 S. W. Rep. 590.

57. EMINENT DOMAIN—Measure of Damages.—Landowner held entitled to have damages assessed on the basis of the most valuable use to which property may be adapted.—Cox v. Philadelphia, H. & P. R. Co., Pa., 64 Atl. Rep. 729.

58. EQUITY—Failure to Prove Plea.—Where a defendant fails, on the hearing, to prove the truth of his plea,

the plea must be overruled as false, and the complainant is entitled to a decree according to the case stated in his bill.—Fennimore v. Wagner, N. J., 64 Atl. Rep. 698.

59. ESTOPPEL — Partition Sale.—Minor heirs, having actively joined in procuring a partition sale of a homestead, held estopped while retaining the benefits to contest the purchaser's equitable title though the court was without jurisdiction to order the sale.—Murphy v. Sisters of the Incarnate Word of San Antonio, Tex., 97 S. W. Rep. 135.

60. EVIDENCE—Assignment of Life Policy.—In the absence of fraud or mutual mistake, held that it could not be shown by parol that an assignment by the beneficiary of his interest in a life policy to the insured was limited to any particular purpose.—Doty v. Dickey, Ky., 96 S. W. Rep. 544.

61. EVIDENCE — Conclusion of Witness. — Testimony that the fires must have been started in a certain way held improper without a statement of the facts on which witness bases his conclusion.—D. H. Fleming & Son v. Pullen, Tex., 97 S. W. Rep. 109.

62. EVIDENCE — Conversations —Proof of conversations between defendants, in the absence of plaintiff, held competent to show meaning of a letter afterward written by one of the defendants.—Dennie v. Clark, Cal., 87 Pac. Rep. 59.

63. EVIDENCE—Official Acts.—Where a published list of delinquent lands was filed in the office of the county clerk and ex-officio clerk of the county court, it cannot be presumed that the clerk filed it in the office of the clerk of the county court.—Drennan v. People, Ill., 78 N. E. Rep. 987.

64. EVIDENCE—Sufficiency of Circumstantial Evidence. —Circumstantial evidence held insufficient to sustain a conviction unless it is such as to exclude every reasonable hypothesis but that of guilt.—Vernon v. United States U. S. C. C. of App., Eighth Circuit, 146 Fed. Rep. 121.

65. EVIDENCE—Surveys.—Where a survey was actually made and the field notes recorded and a patent subsequently issued by the proper authorities, it must be presumed that the surveyor's action was regular.—Waterhouse v. Corbett, Tex., 96 S. W. Rep. 351.

66. EXECUTORS AND ADMINISTRATORS—Claims Against Estate.—In an action for services renderered in his last illness, plaintiff was entitled to recover such sum as his services were reasonably worth, and not such a sum as would reasonably compensate him for the services rendered.—Green's Adm'r v. Teutschman, Ky., 97 S. W. Rep. 7.

67. EXECUTORS AND ADMINISTRATORS—Compromise of Claims —An administrator cannot accept less than its full amount in satisfaction of a demand that accrued in the lifetime of his decedent, except by consent of the probate court.—Van Dusen v. Topeka Woolen Mill Co., Kan., 87 Pac. Rep. 74.

68. EXECUTORS AND ADMINISTRATORS—Possession of Real Estate.—Real estate taken possession of by executors, and not needed for the payment of debts, expenses of administration and legacies, should be divided among the legatees or passed to them in common on settlement of the executor's account.—Harris v. Ingalls, N. H., 64 Atl. Rep. 727.

69. FALSE IMPRISONMENT—Probable Cause. — A conviction shows probable cause for the prosecution and the prosecutor is not liable for false arrest and imprisonment under a valid process calling for the arrest of accused for failure to satisfy the judgment of conviction.—Steinbergen v. Miller, Ky., 96 S. W. Rep. 1101.

70. FORGERY—Checks.—The false and fraudulent execution of a check valid on its face held a forgery, though other steps would have been required if it were genuine to perfect it in the forger's hands.—Norton v. State, Wis., 109 N. W. Rep. 581.

71. FORGERY—Defenses.—One executing an order on a bank in the name of another, held guilty of forgery, though he believed that the other would pay the order and not prosecute him.—Rose v. State, Ark., 96 S. W. Rep. 996.

72. FRAUDS, STATUTE OF—Contract by Agent. — An agent, having authority to sign his principal's name to a contract governed by the statute of frauds, need not indicate that the signature is by the agent.—Whitworth v. Pool, Ky., 96 S. W. Rep. 880.

73. FRAUDULENT CONVEYANCES — Insolvency. — In a suit to set aside a trust deed as a fraud on creditors, plaintiff must allege and prove either the grantor's insolvency when the deed was made, or the issuance of an execution and return *nulla bona* —McAvoy v. Jennings, Wash., 87 Pac. Rep. 53.

74. FRAUDULENT CONVEYANCES — Recovery of Consideration.—Where a conveyance is set aside for fraud as against a creditor the grantee held not entitled as against the creditor to recover back that which he paid. —Porter v. Hart County Deposit Bank & Trust Co., Ky., 96 S. W. Rep. 882.

75. GARNISHMENT—Action to Set Aside Judgment.—A court of chancery will not intervene and set aside a judgment against a garnishee, except on facts showing the clearest and strongest reasons for its action.—Trammell v. Ullman, Lewis & Co., Tex., 96 S. W. Rep 648.

76. GARNISHMENT—Correction of Record.—Where the record in garnishment proceedings was not corrected with reference to the name of the defendant until after the garnishee had appeared, answered, and been discharged, the garnishee was not bound to notice such correction, unless a new writ was served on it.—Boswell v. Citizens' Sav. Bank, Ky., 96 S. W. Rep. 797.

77. GARNISHMENT—Res Judicata.—Where trustee process is brought, and there is no jurisdiction, the plaintiff is not debarred from maintaining the process in another county, but if the discharge is based on facts disclosed, the subject-matter is *res judicata*.—Hibbard v. Newman, Me., 64 Atl. Rep. 720.

78. HOMESTEAD — Abandonment. — A widow cannot claim a homestead in the deceased husband's home place if she has removed from the property and lived elsewhere after a second marriage.—Nelson v. Nelson, Ky., 96 S. W. Rep. 794.

79. HOMESTEAD—Dower.—A wife's absence from the land of her deceased husband, does not bar a suit to have dower and homestead allotted to her out of it.—Bartee v. Edmunds, Ky., 96 S. W. Rep. 535.

80. HOMESTEAD—Land Acquired by Descent.—A debtor inheriting land is entitled to a homestead therein against pre-existing debts, and has a reasonable time in which to convert the inheritance into a homestead.—Roberts v. Adams, Ky., 96 S. W. Rep. 554.

81. HOMICIDE—Nonexpert Evidence on Insanity.—A nonexpert is entitled to give his opinion as to the mental condition of another on the issue of insanity only when the witness details the facts on which such opinion is based.—Stafford v. Tarter, Ky., 96 S. W. Rep. 1127.

82. HUSBAND AND WIFE—Contracts of Wife.—Where one seeks to hold a *feme covert* upon a contract executed when she could only bind herself as described in the statute, it must be shown affirmatively that the contract came within the statutory exception.—Gilbert v. Brown, Ky., 97 S. W. Rep. 40.

83. HUSBAND AND WIFE—Damages for Loss of Wife's Services.—To entitle a husband to recover for the loss of his wife's services while she was incapacitated by reason of an injury due to defendant's negligence it is not necessary to show that he employed or became obligated to pay for the services of another to supply her place as housekeeper.—Garside v. New York Transp. Co., U. S. C. C., S. D. N. Y., 146 Fed. Rep. 588.

84. INJUNCTION — Liability on an Injunction Bond.— Where plaintiff was wrongfully deprived of the right to teach a school, by an injunction sued out by defendant, defendant was liable for the damages sustained on his injunction bond.—Shepherd v. Gambill, Ky., 96 S. W. Rep. 1104.

85. INJUNCTION—Municipal Ordinances.—The mere invalidity of a city ordinance on which certain prosecutions were based held no ground for injunction restraining the same.—City of Chicago v. Chicago City Ry. Co., Ill , 78 N. E. Rep. 890.

86. INSANE PERSONS—Authority of Guardian.—A guardian of an incompetent who is insolvent represents the creditors so far as to enable him to maintain a suit to compel the discharge of a mortgage given by the incompetent in fraud of creditors and covering property needed for the payment of debts.—Brigham v. Madden, N. H., 64 Atl. Rep. 728.

87. INSANE PERSONS—Deeds.—The deed of a lunatic is binding on him if not disaffirmed when his disability is removed.—Spicer v. Holbrook, Ky., 96 S. W. Rep. 571.

88. INTOXICATING LIQUORS—Place of Sale.—Shipment of liquor ordered in another state, into Kentucky and delivered by an express company to the consignee on his payment of a C. O. D., including the price of the liquor and cost of transportation, held interstate commerce and not a violation of the local option law of the district to which the liquor was shipped.—Adams Express Co. v. Commonwealth, Ky., 96 S. W. Rep. 593.

89. JUDGES—Power of Legislature. — The legislature had no power to create a judicial district or provide for a circuit judge in an existing district without providing for the election of a new circuit judge under Const., § 129 —Yates v. McDonald, Ky., 96 S. W. Rep. 865.

90. JUDGMENT—Equitable Relief.—One seeking to restrain enforcement of execution based on a judgment against him held not entitled to equitable relief against the judgment until he had paid a portion thereof as against which he admitted he had no defense.—Kirk v. Gover, Ky., 96 S. W. Rep. 824.

91. JUDGMENT—Matters Concluded.—Where plaintiff bought land, relying on defendant's representation of title which was false, plaintiff's failure to demand a rescission in a suit by third persons to establish their title held no bar to a subsequent suit for such relief.—Olschewske v. King, Tex., 96 S. W. Rep. 665.

92. JUDGMENT—Motion to Quash Venire.—A motion to quash a venire on the ground that colored persons were excluded from the jury list because of their race, is not sustained by the affidavit of the defendant alone, verifying the motion to quash.—Rivers v. State, Tenn., 96 S. W. Rep. 956.

93. LANDLORD AND TENANT—Lease.—Where an oral agreement between a landlord and a tenant as to certain specified repairs was separate from a written lease, it did not constitute a modification of a provision in the lease requiring the tenant to make inside repairs.—Auer v. Vahl, Wis , 109 N. W. Rep. 529.

94. LANDLORD AND TENANT—Lien for Advancements. —In action by landlord against third person for value of cotton on which he held a lien for supplies to tenant, allegation as to application of proceeds of bales of cotton received from the tenant held sufficient.—Cadenhead v. Rogers & Bro., Tex., 96 S. W. Rep. 952.

95. LANDLORD AND TENANT—Priority of Liens on Crop. —The method in which a fund should be distributed between the landlord and various persons having liens on a crop from a sale of which the fund resulted, determined.—Bowles' Exrs. v. Jones, Ky., 96 S. W. Rep. 1121.

96. LIBEL AND SLANDER—Corporations. — A writing charging that plaintiff was a second-hand dealer, did inferior work, ran a scab establishment and did not employ a mechanic held libelous *per se*.—Pennsylvania Iron Works Co. v. Henry Voght Mach. Co., Ky., 96 S. W. Rep. 551.

97. LIFE INSURANCE — Increased Rates.—A life insurance company held not entitled to increase the premium rate of existing insurance except on the occurrence of an emergency whereby the mortuary and reserved funds should become exhausted —Hicks v. Northwestern Aid Assn., Tenn., 96 S. W Rep. 962.

98. LIFE INSURANCE—Surplus.—The surplus of a mutual life insurance company belongs equitably to the policy holders in the proportion to which they contributed it.—United States Life Ins. Co. v. Spinks, Ky., 96 S. W. Rep. 889.

99. LIMITATION OF ACTIONS—Anticipating Defense of Limitations.—One, seeking the reformation of a deed, need not in his petition anticipate a plea of the statute of limitations and allege matter in avoidance thereof.—Swinebroad v. Wood, Ky., 97 S. W. Rep. 25.

100. LIMITATION OF ACTIONS—Dower.—Until dower has been allotted to a widow, limitations do not run against her cause of action to recover the possession of the same.—Bartee v. Edmunds, Ky., 96 S. W. Rep. 535.

101. MALICIOUS PROSECUTION — Probable Cause. — Where a plaintiff, in an action for malicious prosecution, has given evidence establishing a want of probable cause for the prosecution, malice on the part of the prosecutor will be inferred.—Jones v. Louisville & N. R. Co , Ky., 96 S. W. Rep. 798.

102. MARITIME LIENS — Suit to Enforce. — Libelant, which raised a sunken scow under contract with the insurer, held barred by laches from maintaining a suit to subject the vessel to a lien therefor after the right of the owner to sue the insurer had become barred under the terms of the policy.—The Paul L. Bleakley, U. S. D. C., S. D. N. Y., 146 Fed. Rep. 570.

103. MASTER AND SERVANT—Assumed Risk.—An employee operating a circular rip saw, held not to assume the risk as a matter of law.—Dow Wire Works Co. v. Morgan, Ky., 96 S. W. Rep. 580.

104. MASTER AND SERVANT — Breach of Contract of Hiring.—A plaintiff who was hired for a stated term with his canal boat horses and driver, held entitled to recover the full contract price as damages for his wrongful discharge.—Milage v. Woodward, N. Y., 78 N. E. Rep. 873.

105. MASTER AND SERVANT—Contract of Employment. —Where plaintiff was wrongfully deprived of the right to comply with a contract for services, the burden was on him to allege and prove that after reasonable effort he failed to find other employment.—Shepherd v. Gambill, Ky., 96 S. W. Rep. 1104.

106. MASTER AND SERVANT—Defective Appliances.—A telephone company, furnishing swinging platforms for cable splicers, held bound to furnish ropes which were reasonably safe.—Cumberland Telephone & Telegraph Co. v. Metzger's Admr., Ky., 97 S. W. Rep. 35.

107. MASTER AND SERVANT — Defective Appliances.—A master held not liable for an injury to a servant on the theory that he had knowledge of a defective appliance causing the injury in time to have prevented the accident.—St. Pierre v. Foster, N. H., 64 Atl. Rep. 723.

108. MASTER AND SERVANT—Defective Runways.—A servant injured by the defective construction of a runway in defendant's factory, of which the servant had no knowledge, and which was not patent, held not to have assumed the risk.—Lone Star Salt Co. v. Allan, Tex., 97 S. W. Rep. 131.

109. MASTER AND SERVANT—Fellow Servant's Liability. —A servant of a railroad company in charge of its water stations and appliances, guilty of mere nonfeasance, held not liable for injuries to a brakeman because of his being struck by the pipe of a waterspout, which was placed too near the track.—Dudley v. Illinois Cent. R. Co., Ky., 96 S. W. Rep. 835.

110. MASTER AND SERVANT—Injury to Servant.—The use of a hook by the operator of a power drill and not the defective condition of the machine, held the proximate cause of such operator's injury.—Stefanowski v. Chain Belt Co., Wis., 109 N. W. Rep. 532.

111. MINES AND MINERALS—Construction of Lease.—The lessor in a lease of a mining property held not entitled to damages for the lessee's breach of covenant against mining coal on other than the leased premises.—Junction Min. Co. v. Springfield Junction Coal Co., Ill., 78 N. E. Rep. 902.

112. MINES AND MINERALS—Rights of Lessee.—A lease of a coal mining property held to give to the lessee the

right to remove machinery from one shaft on the premises to another.—Junction Min. Co. v. Springfield Junction Coal Co., Ill., 78 N. E. Rep. 902.

113. MORTGAGES—Deed Absolute.—Where an absolute deed is claimed to be a mortgage, the burden is on claimant to prove with clearness and certainty that the instrument was intended by both parties as a mortgage.—Goodbar & Co. v. Bloom, Tex., 96 S. W. Rep. 657.

114. MORTGAGES—Deficiency Judgment.—In a suit to foreclose and for a deficiency judgment a mandate of reversal on appeal held not to entitle complainant to a personal judgment against those individually liable for the debt the mortgage was deposited to secure.—Marling v. Maynard, Wis., 109 N. W. Rep. 537.

115. MORTGAGES—Merger of Securities.—Whether a mortgage is merged and extinguished by the subsequent execution of a deed of trust on the property to the mortgagee securing the same with other indebtedness depends on the intention of the parties.—Crisman v. Lanterman, Cal., 87 Pac. Rep. 89.

116. MORTGAGES—Release by Merger.—Whether a merger results from the uniting of the fee with a mortgage estate in the same person depends upon the intent and interest of the parties. The presumption is that a merger was not intended.—Moffet v. Farwell, Ill., 78 N. E. Rep. 925.

117. MORTGAGES—Services of Mortgagee in Possession.—A mortgagee in possession is not entitled to compensation for personal services on account of the mortgaged property.—Wadleigh v. Phelps, Cal., 87 Pac. Rep. 93.

118. MUNICIPAL CORPORATIONS—Changing Street Grade.—In an action by abutting property owners to recover damages for change in the grade of a street, an instruction precluding a recovery under certain circumstances for injuries to water pipes, laid in the street, held not prejudicial to plaintiffs.—Acker v. City of Knoxville, Tenn., 96 S. W. Rep 973.

119. MUNICIPAL CORPORATIONS—Contract for Services of Engineer.—The employment of an engineer by a city held within the sound discretion of the city council, any abuse of which is subject to judicial review.—City of Decatur v. McKean, Ind , 78 N. E. Rep. 982.

120. MUNICIPAL CORPORATIONS - Release of Penalty.—A city held entitled to relieve a contractor for a street improvement from liability for a penalty incurred for failure to perform his contract within the time specified.—Lindsey v. Brawner, Ky., 97 S. W. Rep. 1.

121. MUNICIPAL CORPORATIONS—Streets.—A conveyance of land to a city for a street, the city agreeing to grade and macadamize the same within two years, held only to require the city to macadamize a strip along the center of the street of a width according to custom.—City of Versailles v. Brown, Ky., 96 S. W. Rep. 1108.

122. MUNICIPAL CORPORATIONS—Street Improvements.—The word "street" in an ordinance ordering a street to be improved at the cost of abutting property means the entire width of the public way and includes the sidewalk.—Morton v. Sullivan, Ky., 96 S. W. Rep. 807.

123. MUNICIPAL CORPORATIONS—Use of Streets.—In an action for injuries caused by a collision between plaintiff's vehicle and one driven by defendant's servant plaintiff held not entitled to the right of way in the use of a street railway track under a city ordinance.—May v. Hahn, Tex., 97 S. W. Rep. 132.

124. PARTITION—Attorney's Fees.—Joint owners of realty suing by attorney for partition held not entitled to have the fee of their attorney paid out of the proceeds of the property, where the other owners selected another attorney to represent them.—Hemingray v. Hemingray, Ky , 96 S. W. Rep. 574.

125. PLEADING—Plea in Abatement.—When an action is brought in a county in which it is alleged the trustee did not reside at the time of the service, a plea in abatement is bad on demurrer if it fails to allege nonresidence at the time the action was commenced.—Hibbard v. Newman, Me., 64 Atl. Rep. 720.

126. PRINCIPAL AND AGENT—Authority of Agent.—Defendants held not entitled to deny the authority of their agent in negotiating a sale of land, and at the same time retain money paid defendants by the purchaser on the faith of the agent's representations.—Schiffer v. Anderson, U. S. C. C. of App., Eighth Circuit, 146 Fed. Rep. 457.

127. PRINCIPAL AND AGENT—Contract of Employment.—A contract of employment construed, and held not to deprive the employer of the right to treat the employee as a purchaser of its goods, as authorized by the contract of employment.—Owensboro Wagon Co. v. Hall, Ala., 42 So. Rep. 113.

128. PRINCIPAL AND AGENT—Libel and Slander—A corporation held liable for a libel written concerning the business ability of another company by its agent in the course of his employment to further defendant's interests.—Pennsylvania Iron Works Co. v. Henry Vogt Mach. Co., Ky., 96 S. W. Rep. 551.

129. PRINCIPAL AND SURETY—Discharge of Surety.—Failure of a bank to apply the proceeds of real estate to a secured debt, as directed by sureties, held to discharge such sureties from liability, though the sureties' obligation had not matured. Western Bank & Trust Co. v. Gibbs, Tex., 96 S. W. Rep. 947.

130. PUBLIC LANDS—Preference Right.—A lessee of state lands is entitled to a preference right to purchase the land provided his right is exercised by completing the purchase before the expiration of his lease.—Welhausen v. Terrell, Tex., 97 S. W. Rep. 79.

131. PUBLIC LANDS — Subsequent Locators. — Actual knowledge by a subsequent locator of the previous location by another precludes him from deriving any advantage from the fact that the surveyor's office contained no evidence thereof at the date of the subsequent location.—Waterhouse v. Corbett, Tex., 96 S. W. Rep. 651.

132. RAILROADS—Care Required in Running Through Storm.—The employees of a railway company running a train through a storm must proceed with the greatest caution.—Louisville & N. R. Co. v. Ueltschi's Ex'rs, Ky., 97 S. W. Rep. 14.

133. RAILROADS—Injury to Pedestrian on Highway.—A person driving on a public highway contiguous to a railroad crossing has a right to rely on the statutory warnings in approaching the crossing.—Louisville & A. R. Co. v. Davis, Ky., 96 S. W. Rep. 533.

134. RAILROADS—Negligence.—In an action for death of a passenger by being thrown from the platform of a train as he was passing from one car to another whether the platform gates were sufficient and whether defendant was guilty of negligence in failing to have them closed held question for jury.—Boston & M. R. Co. v. Stockwell, U. S. C. C. of App., Second Circuit, 146 Fed. Rep. 505.

135. RAILROADS—Place to Alight.—Where a carrier has afforded passengers a reasonable time to alight, it is not bound to give notice of the contemplated starting of the train.—Gulf, C. & S. F. Ry. Co. v. Booth, Tex., 97 S. W. Rep. 128.

136. RAILROADS — Rate of Speed.—That the train, by which intestate was struck, was running at an excessive rate of speed, held immaterial, where he had knowledge of its approach, and could have avoided the injury.—Illinois Cent. R. Co. v. Willis' Adm'r., Ky., 97 S. W. Rep. 21.

137. REPLEVIN — Scope of Inquiry.—In replevin, the question as to the creation of a trust in the property transferred to an intervener under a bill of sale held properly triable in the action.—Hurley v. Walter, Wis., 109 N. W. Rep. 558.

138. SALES—Goods Sold by Samp'e.—Where goods are sold by sample, the buyer is entitled to examine and reject them, if not according to sample, though the order provided for delivery f. o. b. at the seller's place of business.—Keeler v. Paulus Mfg. Co., Tex., 96 S. W. Rep. 1097.

139. SALES—Mistake.—A mistake in an order for goods held no defense to an action for the price, in the absence

of proof that the seller knowingly took advantage of the mistake.—Bevins v. J. A. Coates & Sons, Ky., 96 S. W. Rep. 585.

140. SCHOOLS AND SCHOOL DISTRICTS—Mandamus to Compel Admission to School Privileges.—*Mandamus* held the proper remedy to compel the granting of school privileges to a child not complying with an illegal regulation of a school board.—Harley v. Lindemann, Wis., 109 N. W. Rep. 570.

141. SHIPPING—Charter Hire.—A charterer held entitled to a deduction of charter hire during the time the vessel was detained in quarantine owing to the illness of the crew under a charter party which required the owner to furnish the crew to efficiently man the vessel.—Tweedle Trading Co. v. George D. Emery Co., U. S. D. C., S. D. N. Y., 146 Fed. Rep. 618.

142. SHIPPING — Damage to Passenger's Baggage.—Proof that a passenger's baggage was delivered to a vessel in good condition, and was damaged by sea water at the end of the voyage, is sufficient to establish the negligence of the carrier.—Weinberger v. Compagne Generale Transatlantique, U. S. D. C., S. D. N. Y., 146 Fed. Rep. 516.

143. SPECIFIC PERFORMANCE—Contract to Devise.—A contract of a testator to devise property to his son held enforceable by the son though he has not objected to the probate of the will —Phalen v. United States Trust Co., N. Y., 78 N. E. Rep. 948.

144. STREET RAILROADS—Injury to Alighting Passenger.—Where the servants of a street railway company saw plaintiff attempting to alight when the car stopped at a switch, it was their duty not to start the car until plaintiff had reached the street.—South Covington & C. St. Ry. Co. v. Core, Ky., 96 S. W. Rep. 562.

145. STREET RAILROADS—Injury to Boy Crossing Track. A street railway company was not liable for the negligent death of a boy, where he was standing about eight feet from the track and suddenly ran across it immediately in front of the car —Louisville Ry. Co. v. Edelen's Adm'x, Ky., 96 S. W. Rep. 901.

146. TAXATION — Assessing Exempt Property.—The remedy of one whose exempt property has been assessed is by an application for abatement, and on the refusal of the municipality to abate, to apply to the court as authorized by Pub. St. 1901, ch. 59, § 11.—Town of Canaan v. Enfield Village Fire Dist., N. H , 64 Atl. Rep. 725.

147. TAXATION—Franchises.— The value of the franchise of a corporation for the purpose of taxation is the difference between the market value of its shares and the value of its tangible property.—Crocker v. Scott, Cal., 87 Pac. Rep. 102.

148. TAXATION - Railroads.—A state, seeking to recover taxes from railroads in excess of the sum actually due, held not entitled to recover the penalties imposed on railroads failing to pay taxes.—State v. Galveston, H. & S. A. Ry. Co., Tex., 97 S. W. Rep. 71.

149. TAXATION—Tax Sale.—Ballinger's Ann. Codes & St. § 815 held to authorize service of notice of a demand for a deed by a purchaser of land for delinquent assessments by publication only after the certificate holder has made diligent search for the owner, in order to make personal service.—Albring v. Petronio, Wash., 87 Pac. Rep. 49.

150. TIME—Solar or Standard.—Solar time held to be properly used in determining the expiration of a term of court as fixed by statute.—Texas Tram & Lumber Co. v. Hightower, Tex., 96 S. W. Rep. 1071.

151. TRADE-MARKS AND TRADE-NAMES—Contributory Infringement.—Where, in the settlement of a suit for infringement of a trade-mark, complainant waived all claims against the defendant and its customers for past infringement: a court of equity will not thereafter grant complainant relief against a contributory infringer.—Hillside Chemical Co. v. Munson & Co., U. S. C. C., D. Conn., 146 Fed. Rep. 198.

152. TRADE MARKS AND TRADE NAMES—Unfair Competition.—An artist has no such common law right in pictures drawn by him and sold to another, who published and copyrighted the same as to render it unfair competition in trade for the latter to publish other pictures depicting different scenes merely because they contain characters in imitation of those in the earlier ones.—Outcalt v. New York Herald, U. S. C. C. S. D. N. Y., 146 Fed. Rep. 205.

153. TRESPASS TO TRY TITLE—Common Source of Title.—Where adjoining owners have purchased from a common vendor, and each claims that his tract extends over that claimed by the other, the vendor is the common source of title.—Young v. Trahan, Tex., 97 S. W. Rep. 147.

154. TRESPASS TO TRY TITLE—Right to Possession.—Where in an action to recover realty, based on a written lease to a bank, the owner of the premises being a party prays for possession for the use of the bank, held entitled to recover, though the lease to the bank was void.—Lechenger v. Merchants' Nat. Bank, Tex., 96 S. W. Rep. 638.

155. TROVER AND CONVERSION—Oil and Gas Lease.—A lessor in a lease to explore for oil and gas held liable for the conversion of the lessee's property placed on the premises.—Duff v. Bailey, Ky., 96 S. W. Rep. 577.

156. TRUSTS—Expenses of Management.—Where a trustee was authorized to employ and discharge attorneys, agents and a trust company, to assist in the management of the trust estate, the expense of such employment was a proper charge on the income of the estate, and not against the fund of the trustee.—Wilder v. Hast, Ky., 96 S. W. Rep. 1106.

157. VENDOR AND PURCHASER—Construction of Contract to Convey.—A bond for title to land held to include all the land owned by defendant on the waters and beneath the watershed of a certain stream lying back of and beyond the lines of complainant's land on the same stream.—Cox v. Burgess, Ky., 96 S. W. Rep. 577.

158. VENDOR AND PURCHASER — Written Contract.—Memorandum of agreement for sale of realty and certain notes and mortgages held to constitute the contract between the parties.—Ditchey v. Lee, Ind., 78 N. E. Rep. 972.

159. WAREHOUSEMEN—Misdelivery of Stored Cotton.—Compress and warehouse company delivering cotton on presentation of compress receipts by one not the owner held liable therefor to owner —Citizens' Bank of Little Rock v. Arkansas Compress & Warehouse Co , Ark., 96 S. W. Rep. 997.

160. WATERS AND WATER COURSES—Riparian Rights.—The entire use of water by an upper riparian proprietor at his mill and at his reservoir, held properly considered in determining the limits of his rights as against lower proprietors.—Mason v. Whitney, Mass , 78 N. E. Rep. 881.

161. WILLS—Assignment of Share of Devisee.—Agreement among devisees held an equitable assignment of the share of one of them in the realty of the decedent to the others to the extent necessary to satisfy the agreement.—Thompson Ex'rs v. Stiltz, Ky., 96 S. W. Rep. 884.

162. WITNESSES—Evidence to Establish Trust.—In an action by the infant heirs of a decedent against his widow to recover real estate standing in his name, on the ground that it had been conveyed by decedent under a parol trust for plaintiffs, testimony of the widow held competent.—Nelson v. Nelson, Ky., 96 S. W. Rep. 794.

163. WITNESSES — Privileged Communications. — A letter written by a railroad's general counsel to its local attorney, relating to an issue arising at the trial of an action against the railroad company, held privileged.—Missouri, K. & T. Ry. Co. of Texas v. Williams, Tex., 96 S. W. Rep. 1087.

164. WORK AND LABOR—Contract of Employment.—In an action for breach of an express contract of employment which was within the statute of frauds there could be no recovery on a *quantum meruit*.—Ballantine v. Yung Wing, U. S. C. C., D. Conn., 146 Fed. Rep. 621.